Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-765

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, UPPER SOUTH DEPARTMENT, AFL-CIO, *Petitioner*

v.

QUALITY MANUFACTURING COMPANY and NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The International Ladies' Garment Workers' Union, Upper South Department, AFL-CIO, (the Union), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on July 19, 1973 (*infra*, p. 72a).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 481 F.2d 1018 (*infra*, pp. 58a-71a). The opinion of the National Labor Relations Board is reported at 195 NLRB No. 42 (*infra*, pp. 1a-58a).

JURISDICTION

The judgment of the Court of Appeals was entered on July 19, 1973 (*infra*, p. 72a). On October 5, 1973, Mr. Chief Justice Warren E. Burger entered an order extending the time within which to file a petition for a writ of certiorari to December 17, 1973. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Act protects an employee and her fellow-employees who are her union representatives from discharge or other discipline by their employer where (1) the employer discharges the employee because she declines to submit to questioning by her employer which she reasonably believes may lead to disciplinary action against her unless she is accompanied by and has the assistance of her union representative at the interview, and (2) the employer suspends one union representative, and suspends and later discharges another union representative, because they seek to furnish the representation asked of them by their fellow-employee.

STATUTE INVOLVED

Section 7 of the National Labor Relations Act (29 U.S.C. § 151) accords employees *inter alia* "the right . . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7"; section 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in . . .

employment to encourage or discourage membership in any labor organization. . . ."; and section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees. . . ."

STATEMENT

I. The Findings

The findings of the National Labor Relations Board, affirmed by the Court of Appeals, may be summarized as follows:

Quality Manufacturing Company (the Company) is engaged in the manufacture of women's clothing (A. 14, 34; *infra*, pp. 2a, 19a). Its owners and principal officers are Lawrence Gerlach, Sr., president; Mary Kathryn Gerlach, his wife and production manager; and Lawrence Gerlach, Jr., their son and general manager (A. 14-15; *infra*, pp. 2a, 59a). The Union since 1968 has been the certified collective bargaining representative of the Company's production employees (A. 35; *infra*, pp. 20a, 59a). The agreement between the Company and the Union provides that "[t]here shall be a Shop Chairlady . . . selected by or under the auspices of the Union" (A. 461). In 1969 Delila Mulford was the Shop Chairlady (A. 37; *infra*, pp. 23a, 59a); Martha Cochran was Assistant Shop Chairlady and Secretary-Treasurer of the Union (A. 35; *infra*, pp. 20a, 60a); and Catherine King was a long-time employee of the Company (A. 15; *infra*, pp. 2a, 59a).

On October 16, 1969, the Company discharged Catherine King because she had refused to attend a conference at the Company's request without union representation in circumstances where she "had

reasonable grounds to believe that disciplinary action might result from the Employer's investigation of her conduct" (A. 17, 21, 63; *infra,* pp. 4a, 7a, 24a). On October 12, 1969, the Company had suspended shop chairlady Delila Mulford for two days, and on October 16, 1969, the Company discharged her, for her persistence "in seeking to represent King at the conference . . . [which the Company] requested" (A. 15, 17, 21-22, 58, 60; *infra,* pp. 3a, 4a, 8a, 23a-24a). On October 14, 1969, the Company had suspended assistant shop chairlady Martha Cochran for two days for the same reason (A. 16-17, 21-22, 52; *infra,* pp. 3a-4a, 8a, 21a). On October 16, 1969, the Company discharged Martha Cochran for "filing grievances on behalf of herself, Mulford, and King" (A. 17-18, 22, 56; *infra,* pp. 4a, 9a, 22a).

The events which culminated in the suspensions and discharges began on the morning of Friday, October 10, 1969. On that morning shop chairlady Delila Mulford, employee Catherine King, and two other employees met with all three Gerlachs. At the meeting the employees complained that they could not make a satisfactory wage under the piece work system then in effect. The discussion ended with Gerlach, Jr., ordering Mulford to return to her work station and telling her "if [the employees] didn't like the way it was there in the company to go elsewhere." (A. 15, 38; *infra,* pp. 2a, 23a, 59a.)

Later the same day, while on the production floor, Mrs. Gerlach noticed that King had shut down her machine, and was waving her arms and gesturing, causing some minor disturbance. Two other employees had stopped their machines and were watching King. Mrs. Gerlach directed King to resume production, but

King told her to "tend to your business." Thereupon Mrs. Gerlach ordered King to go to Mr. Gerlach's office. King did, but on her way to the office she asked shop chairlady Mulford to accompany her. Mrs. Gerlach warned Mulford that she "had no business down there," but Mulford left her work station and accompanied King to the anteroom of Mr. Gerlach's office. Mrs. Gerlach informed her husband of what had transpired. Mr. Gerlach told Mulford to return to her work station because "it wasn't a grievance and [they] didn't have any business with her." Mulford refused, replying that "Catherine paid her dues and she was entitled to [have me] be there," to which the Gerlachs rejoined that Mulford "was endangering . . . [her] job. . . ." Mr. Gerlach ordered King to come into his office for a discussion but King replied that she would not without Mulford. Gerlach then told both King and Mulford to return to their work stations. They did. On Sunday, October 12, Gerlach telephoned Mulford and informed her that she was suspended for two days. He gave no reason, but Mulford understood that it was because of her conduct in seeking to represent King on the previous Friday, as it was. (A. 15-16, 38, 148; *infra,* pp. 2a-3a, 23a-24a, 59a-60a.)

The following Monday, October 13, King found upon reporting for work that her time card was not in the rack, indicating under plant practice that she was wanted in Mr. Gerlach's office. This time King asked Martha Cochran, the assistant shop chairlady, to accompany and represent her. Cochran went with King without first "punching in" on her own time card. They met Mrs. Gerlach outside the office. She warned Cochran that "your time card is upstairs and my advice to you is to go upstairs and go to work if you want your job." She added that the Gerlachs

wanted to talk only to King and "take up where we left off Friday." Cochran replied, "Well, Mrs. Gerlach, I'm sorry, but if that's what you want to talk to her about, that is union business and she has asked me to represent her," stating further that she was a union steward and that was her duty. Cochran and King then spoke to Mr. Gerlach and asked him if he was going to give King her time card. He said that he would not until King came into his office and talked to him in private. Cochran and King declined to accede to the request for an interview with King without union representation. They sat and waited in or near the office for the remainder of the day. In the meantime Cochran's card was also "pulled" from the rack. (A. 16, 35-36; *infra,* pp. 2a-3a, 20a-21a, 60a-61a.)

The next morning, Tuesday October 14, Cochran and King again went to Gerlach's office. They asked him if he was going to return King's time card. Gerlach again replied that he would not until King talked to him in private. Cochran asked about her own card. She was informed that she had been suspended for two days for being away from her work station the day before. King and Cochran left the plant. (A. 16-17, 36; *infra,* pp. 3a-4a, 21a, 61a.)

The next day, Wednesday October 15, Mulford's two-day suspension ended. She went to Gerlach's office together with Cochran and King. They were met by the Gerlachs. Mulford inquired as to the status of Cochran and King. Mr. Gerlach replied that Cochran was still under suspension for another day and that he would not give King her time card until she came into the office and talked to him in private. Cochran and King left. Mulford went to work. (A. 17, 36, 38-39; *infra,* pp. 4a, 24a, 61a.)

The following day, Thursday October 16, Cochran's two-day suspension expired. She, Mulford and King went to the office and were again met by the Gerlachs. Mrs. Gerlach gave Cochran her time card and she went to work. Mrs. Gerlach then told King that Mr. Gerlach wanted to see her in the office alone. King asked, "With Delila [Mulford]?" Mr. Gerlach said, "No, not with Delila." He added that if King "went out the door"—that is, again declined to participate in a private interview—"she was finished." King walked out. Mulford then asked if she could go to work. Gerlach replied, "No. You've abandoned your job. You're finished." (A. 17, 39; *infra,* pp. 4a, 24a, 61a.)

During the noon hour of the same day, October 16, Cochran went to the office of Gerlach, Jr., and sought to present written grievances to him on behalf of Mulford, King, and herself. Gerlach, Jr., told her that he did not have time "to fool with them damn things. . . . I'm leaving town." Cochran laid the grievances on his desk but Gerlach picked them up and threw them in the trash. He then walked into the work area, pulled Cochran's time card, and told her, "you worked this morning, but you're not working this afternoon." Cochran went to the office of Gerlach, Sr., and asked if she had been fired. He responded, "Just go home. You wanted to draw unemployment now go on and draw it." Cochran left the plant. Later that day Cochran telephoned Gerlach's secretary and asked whether Gerlach wanted her to report for work the next day. The secretary told her, "He said no." Cochran asked the secretary to "tell him that he can reach me at my home phone when he needs me." Cochran was never notified to come back to work. (A. 18, 37, 129; *infra,* pp. 4a, 22a, 61a-62a.)

II. The Board's Conclusions and Order

The Board's conclusions divide into three related parts.

1. The Board found that on October 16, 1969, the Company discharged Catherine King because she had refused to attend an interview at its request without union representation in circumstances where she "had reasonable grounds to believe that disciplinary action might result from the Employer's investigation of her conduct" (A. 17, 21; *infra,* pp. 4a, 7a). This finding confronted the Board with the need to address the question of whether or not statutory protection is available in "a situation where an employee or his representative had been disciplined or discharged for requesting, or insisting on, union representation in the course of an interview" in which the risk of discipline to the to-be-interviewed employee reasonably existed (A. 18; *infra,* p. 5a). The Board concluded that in such a situation "it is a serious violation of an employee's individual right to be represented by his union if he can only request or insist on such representation under penalty of disciplinary action" (A. 19; *infra,* p. 6a). The Board explained that the employer was free to forego the interview if he was unwilling to conduct the interview with the union representative present, but that the employer was not free to coerce the employee's unrepresented attendance. The Board stated the rationale in support of its conclusion as follows (A. 19-20; *infra,* pp. 6a-7a):

> This seems to us to be the only course consistent with all of the provisions of our Act. It permits the employer to reject a collective course in situations such as investigative interviews where a collective course is not required but protects the employee's right to protection by his chosen agents. Participation in the interview is then voluntary, and, if the employee has reasonable ground to fear that the interview will adversely affect his continued employment, or even his working conditions, he may choose to forego it unless he is afforded the safeguard of his representative's presence. He would then also forego whatever benefit might come from the interview. And, in that event, the employer would, of course, be free to act on the basis of whatever information he had and without such additional facts as might have been gleaned through the interview.
>
> This seems to us to be the proper rule where, as here, the interview, whether or not purely investigative, concerns a subject matter related to disciplinary offenses.

The Board limited the employee's right to be free of coerced attendance at an interview without union representation to the situation where the employee has "reasonable grounds to fear" that the outcome of the interview may adversely affect his employment status (A. 20 and n. 3; *infra,* p. 6a and n. 3). This qualification meshes the employee's lack of need for protection where cause for apprehension does not reasonably exist with the employer's interest in operational flexibility. As the Board stated, "We would not apply the rule to such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques. In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus we would then see no reasonable basis for him to seek the assistance of his representative" (A. 20-21; *infra,* p. 7a). The Board later explicitly confined the employee's right to be free of coerced attendance at an interview with-

out union representation to the situation where the employee requests representation.[1] Finally, the Board adhered to its settled position distinguishing between an investigatory interview and a disciplinary interview. The Board found that the requested interview in this case was investigatory, and pointed out that, (1) as here, at an investigatory interview of an employee, which is fact-gathering in purpose, the employer has the option not to meet with the union representative so long as he chooses to forego the interview, while (2) at a disciplinary interview of an employee, where the employee is to be disciplined or the decision to discipline him is to be made, the employer has an indefeasible statutory bargaining obligation to meet with the union representative (A. 18; *infra,* p. 5a).[2]

Accordingly, one member dissenting, the Board concluded that "King had reasonable grounds to believe that disciplinary action might result from the Employer's investigation of her conduct. Under these circumstances King reasonably requested union representation. It is also clear that . . . [the Company] discharged King for insisting on this right. Therefore, we conclude that King's discharge was in violation of Section 8(a)(1)" (A. 21; *infra,* pp. 7a-8a).

2. The Board found that the Company suspended shop chairlady Delila Mulford and assistant shop chairlady Martha Cochran "for performing their duties as union chairladies in seeking to represent King

[1] *Mobil Oil Corporation,* 196 NLRB No. 144, 80 LRRM 1188, 1191, n. 2 (1972), enforcement denied, 482 F.2d 842 (C.A. 7, 1973).

[2] Cf., *Texaco, Inc.,* 168 NLRB 361 (1967), enforcement denied, 408 F.2d 142 (C.A. 5, 1969), with *Jacobe-Pearson Ford,* 172 NLRB 594 (1968).

. . .", and later discharged Mulford for "insisting on representing King" (A. 21-22; *infra,* p. 8a). Accordingly, one member dissenting, the Board concluded that, as the conduct constituted "protected concerted activity," the suspensions and discharge "violated Section 8(a)(1) of the Act" (A. 22; *infra,* pp. 8a-9a).

3. The Board unanimously concluded that the Company "discharged Cochran because she sought to engage in a protected concerted union activity, filing grievances on behalf of herself, Mulford, and King. Thus her discharge was in violation of Section 8(a)(3) and (1) of the Act" (A. 22; *infra,* p. 9a).

The order entered by the Board precisely encases its conclusions. As to coerced participation of an employee in an interview without union representation, the Board ordered the Company to refrain from (A. 23; *infra,* pp. 9a-10a):

> Disciplining any employee for requesting to be represented by a labor organization at any interview or meeting held with the employee where the employee has reasonable grounds to believe that the matters to be discussed may result in his being the subject of disciplinary action.
>
> * * *
>
> Requiring, under threat of discipline, that any employee take part in an interview or meeting without union representation, where such representation has been requested by the employee and where the employee has reasonable grounds to believe that the matters to be discussed may result in his being the subject of disciplinary action.

As to the efforts of the union representatives to furnish their fellow-employee with the representation

asked of them, the Board ordered the Company to refrain from (A. 23; *infra,* p. 10a):

> Discriminating against union chairladies for seeking to represent employees at any meeting held with an employee where the employee has reasonable grounds to believe that the matters to be discussed may result in his being the subject of disciplinary action and the employee has requested such representation.

As to the presentation of a grievance by a union representative, the Board ordered the Company to refrain from (A. 24; *infra,* p. 10a):

> Discriminating against union chairladies for seeking to file grievances.

Finally, the Board ordered the Company to offer reinstatement to King, Mulford and Cochran, and to make them whole for any loss of earnings sustained by them because of their suspensions and discharges (A. 72; *infra,* p. 55a).

III. The Decision of the Court of Appeals

The Court of Appeals enforced that part of the Board's order pertaining to the discharge of Cochran for "filing grievances on behalf of herself, Mulford, and King" (*infra,* p. 62a). But it denied enforcement of the remainder of the order on the ground that "King had no right to have a union representative present at the requested meetings with her employer . . ." (*infra,* p. 62a). It based its conclusion virtually wholly on its reading of precedent (*infra,* pp. 63a-70a). In its view, while there is "no doubt that employees have a right to union representation after a grievance has been filed," the "issue here is whether that right may be extended under the Act to require employers to permit an employee to have union representation at interviews . . .

whenever the employee has reasonable grounds to believe that disciplinary action might result from the employer's investigation" (*infra,* p. 68a, n. 1). According to the Court of Appeals, prohibition of coerced attendance at such an interview rests on a "new theory as to the meaning and application of the Act, and the extent of employees' rights thereunder," and implicates the Board in an impermissible assertion of "power to alter or rearrange employer-employee relations to suit its every whim" (*infra,* p. 70a).

On July 17, 1973, two days before the decision of the Court of Appeals in this case, the Court of Appeals for the Seventh Circuit reached a like conclusion upon the same question.[3] In its view, while the right to bargain for and to exert economic pressure to secure union representation at an investigatory interview by contract "is plainly guaranteed by § 7 of the Act" (482 F.2d at 845), the statute does not by its own force confer the right to union representation, for the "requested Union representation at an investigatory interview is clearly not the kind of 'concerted activity' with which § 7 is primarily concerned" (*id.* at 847). Why it is not is unexplained. The court simply relied on its perception of "precedent" and its unparticularized version of "history" (*id.* at 847-848). It was moved to its conclusion by apparent reluctance to embrace what it believed to be a "novel . . . interpretation" which, as it saw it, "would have been recognized many years ago" were it valid (*ibid.*).

On October 9, 1973, the Court of Appeals for the Fifth Circuit joined the Fourth and Seventh Circuits

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[3] *Mobil Corporation* v. *N.L.R.B.*, 482 F.2d 842 (C.A. 7, 1973).

in rejecting the Board's conclusion.[4] Like the other courts of appeals, it rested its view on its perception of precedent (84 LRRM at 2438), opining without analysis "that an investigatory interview would be a premature stage at which to invoke a requirement of union representation in the absence of some showing that the purpose of the interview was not merely to elicit facts concerning employee conduct but to impose disciplinary measures upon the employee so that grievance hearings later on would merely put the seal on the employer's prejudgment" (*id.* at 2439).

REASONS FOR GRANTING THE WRIT

1. Whether the National Labor Relations Act protects an employee from compulsory attendance without union representation at an interview which he reasonably believes may result in his subjection to discipline is an important and recurrent question which this Court should decide.[5] The administration of discipline to

[4] *N.L.R.B.* v. *J. Weingarten*, 84 LRRM 2436 (C.A. 5, 1973).

[5] Its recurrence is patent. *Western Electric Co.*, 205 NLRB No. 46, 84 LRRM 1041 (1973); *New York Telephone Co.*, 203 NLRB No. 180, 83 LRRM 1353 (1973); *J. Weingarten, Inc.*, 202 NLRB No. 69, 82 LRRM 1559 (1973), enforcement denied, 84 LRRM 2436 (C.A. 5, 1973); *National Can Corp.*, 200 NLRB No. 156, 82 LRRM 1096 (1972); *Western Electric Co.*, 198 NLRB No. 82, 80 LRRM 1705 (1972); *Mobil Oil Corp.*, 196 NLRB No. 144, 80 LRRM 1188 (1972), enforcement denied, 482 F.2d 842 (C.A. 7, 1973); *Lafayette Radio Electronics*, 194 NLRB No. 77, 78 LRRM 1693 (1971); *Illinois Bell Tel. Co.*, 192 NLRB No. 138, 78 LRRM 1109 (1971); *United Aircraft Corp.*, 179 NLRB 935, 937-938, 968-969 (1969), affirmed, 440 F.2d 85, 88, 97-98 (C.A. 2, 1971) (merits of question not reached by NLRB or Court of Appeals); *Texaco Inc.*, 179 NLRB 976 (1969); *Wald Mfg. Co.*, 176 NLRB 839, 846 (1969), affirmed on proceedings not presenting this question, 426 F.2d 1328 (C.A. 6, 1970); *Dayton Typographic Service*, 176 NLRB 357 (1969); *Jacobe-Pearson Ford, Inc.*, 172 NLRB 594 (1968); *Chevron Oil Co.*, 168 NLRB 574 (1967); *Texaco, Inc.*, 168 NLRB 361 (1967), enforcement denied, 408 F.2d 142 (C.A. 5, 1969); *Electric Motors and Specialties*, 149 NLRB 1432, 1440 (1964); *Dobbs Houses*, 145 NLRB 1565, 1570-71 (1964); *Ross Gear and Tool Co.*, 63 NLRB 1012, 1033-34 (1945), enforcement denied, 158 F.2d 607, 611-614 (C.A. 7, 1947).

control on-the-job misconduct is a pervasive part of life in the industrial community. For the worker discharge because of a claimed infraction is economic capital punishment, and lesser discipline is simply less severe punishment which is different in the degree of injury but not in the quality of the worker's concern with it. For the employer discipline is necessary to the maintenance of order and responsible conduct essential to production. For both substantive and procedural fairness in the administration of discipline is indispensable. For the worker the need for protection against unjust punishment is self-evident. For the employer the need to refrain from unjust punishment is hardly less self-evident, for there is nothing more likely to wrack the industrial community to the detriment of the employer's self-interest in production and profitability than disciplinary unfairness. Determination of the role that the National Labor Relations Act plays in the administration of industrial discipline is therefore as important a question as can arise under this statute. If that role is as crabbed as the several courts of appeals believe, we need to know that. And if it is more hospitable and enfolding, as we believe it to be, we need to know that. In short, whatever the answer may be, the question requires definitive determination so that employers, workers, and the unions who represent them may know how to order their affairs.

2. All grant that at or after the imposition of discipline the employee is statutorily entitled to union rep-

resentation to contest it. The question then is whether the employee is entitled to union representation in the predecisional stage when the employer seeks to subject him to a compulsory interview preparatory to its determination of whether or not the employee merits discipline.

The employee's need for the protection of union representation is at least as exigent in the investigation of his conduct by inquiry of him before the decision is made as it is thereafter. For fright, inexperience, or ignorance may expose him to unmerited discipline which would be avoidable had he had the aid of knowledgeable union representation at his interview. And the employer himself might well reach a different decision if his own inquiry of the employee were informed by the competent contribution of the union representative. Furthermore, the purpose of an interview is not confined to confirming or establishing the existence or absence of blameworthy conduct. Questions in extenuation of the offense and of the appropriate extent of discipline also require exploration.

Accordingly, what happens at the interview is always significant, and often decisive, in determining whether or not discipline is merited and in assessing the appropriate degree of punishment. To require postponement of union representation until after the decision is reached is therefore to deny it at the critical predecisional stage which may for all practical purposes be conclusive of the outcome.

Compelling the employee's subjection to such an interview without the assistance of union representation cannot be squared with the National Labor Relations Act. For the employee is required to confront his employer alone and unaided when the entirety of the statute is premised on eliminating just such individual helplessness. Thus, the mischief which the Act identifies is the "inequality of bargaining power between employees . . . and employers . . ." (§ 1, 2d ¶); the end it seeks is "restoring equality of bargaining power between employers and employees" (§ 1, 3d ¶); and the means by which that goal is to be realized is through "protecting the exercise by workers of full freedom of association . . . and designation of representatives of their own choosing . . . for the purpose of . . . mutual aid or protection . . ." (§ 1, 5th ¶). The Act thus rests on the old insight that "[a] single employee was helpless in dealing with an employer", and that "[u]nion was essential to give laborers opportunity to deal on equality with their employer."[6] Its design is to establish the conditions of equality by protecting recourse to collective action and thereby to overcome the "relative weakness of the isolated wage earner caught in the complex of modern industrialism . . . ."[7]

To require an employee to submit to an interview which may lead to his discipline without the aid of union representation is therefore to perpetuate the very inequality which the Act denounces and to bar protected recourse to the very means which the Act safeguards as the way to overcome that inequality. Accordingly, the Board perceptively reached to the heart of the Act in rejecting that basic contradiction (*Mobil Oil Corp.*, 196 NLRB No. 144, 80 LRRM 1188, 1191

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[6] *American Steel Foundries* v. *Tri-City C.T. Council*, 257 U.S. 184, 209 (1921).

[7] S. Rep. No. 573, 74th Cong., 1st Sess., 3 (1935).

(1972), enforcement denied, 482 F.2d 842 (C.A. 7, 1973)):

> An employee's right to union representation upon request is based on Section 7 of the Act which guarantees the right of employees to act in concert for "mutual aid and protection." The denial of this right has a reasonable tendency to interfere with, restrain, and coerce employees in violation of Section 8(a)(1) of the Act. Thus, it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy. Such a dilution of the employee's right to act collectively to protect his job interests is, in our view, unwarranted interference with his right to insist on concerted protection, rather than individual self-protection, against possible adverse employer action.

Inhospitality to this view simply reflects an attitude unattuned to the basic reach of this statute. Statutory solicitude for the employee easily embraces protecting him in his refusal to submit without union representation to an investigatory interview of his conduct in which the risk of discipline reasonably inheres. And the extent to which a contrary conclusion is alien to the Act is exemplified by the decisions cited by the Seventh Circuit to support the applicability in this case of the view that an activity may "not in fact [be] protected" though within the "literal reading of § 7 . . ." (482 F.2d at 846. For we are asked to look for guidance to such unprotected activity as mutiny (*Southern Steamship Co.* v. *N.L.R.B.*, 316 U.S 31 (1942)), participation in a violent sitdown strike (*N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S 240 (1939)), engagement in a

breach-of-contract strike (*N.L.R.B.* v. *Sands Mfg. Co.*, 306 U.S. 332 (1932), and disparagement of the employer's product in circumstances akin to physical sabotage (*N.L.R.B.* v. *Local No. 1229, I.B.E.W.*, 346 U.S. 464 (1953)) (482 F.2d at 846, n. 11). It is a measure of the infelicity of the understanding of this statute that these decisions should be invoked when the question at issue is whether an employer can coerce an employee's subjection to an interview without union representation in circumstances where the employee reasonably fears that he is exposed to the infliction of discipline.

3. Recognition that an employee has a statutory right to refuse to submit without union representation to an interview in which the risk of discipline reasonably inheres harmonizes with actual industrial practice. "An essential part of any investigation is to give the employee affected full opportunity to explain his actions."[8] But a full opportunity is significantly less than full if the employee is without the aid of union representation. Accordingly, "there is a well-established current of arbitral authority sustaining the right of such representation where the situation is such that the employee who is called in for interrogation has reasonable cause to anticipate that the interview will result in the development of information which will be utilized as the basis for disciplinary action against him."[9] The participation of the union representative in the interview does not convert it into an adversary contest but rather enhances its usefulness by increasing the likelihood of securing more accurate information and a more informed interchange of views

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[8] Slichter, Healy & Livernash, The Impact of Collective Bargaining on Management, 646 (1960).

[9] *Chevron Chemical Co.*, 60 LA 1066, 1071 (M.H. Merrill, 1973).

to the advantage of all (*Independent Lock Co.*, 30 LA 744, 746 (J. W. Murphy, 1958)):

> [Participation by the union representative] might reasonably be designed to clarify the issues at this first stage of the existence of a question, to bring out the facts and the policies concerned at this stage, to give assistance to employees who may lack the ability to express themselves in their cases, and who, when their livelihood is at stake, might in fact need the more experienced kind of counsel which their union steward might represent. The foreman, himself, may benefit from the presence of the steward by seeing the issue, the problem, the implications of the facts, and the collective bargaining clause in question more clearly. Indeed, good faith discussion at this level may solve many problems, and prevent needless hard feelings from arising.... [It] can be advantageous to both parties if they both act in good faith and seek to discuss the question at this stage with as much intelligence as they are capable of bringing to bear on the problem.[10]

[10] See also, *Caterpillar Tractor Co.*, 44 LA 647, 651 (H.J. Dworkin, probably 1965):

> The procedure . . . contemplates that the steward will exercise his responsibility and authority to discourage grievances where the action on the part of management appears to be justified. Similarly, there exists the responsibility upon management to withhold disciplinary action, or other decisions affecting the employees, where it can be demonstrated at the outset that such action is unwarranted. The presence of the union steward is regarded as a factor conducive to the avoidance of formal grievances through the medium of discussion and persuasion conducted at the threshold of an impending grievance. It is entirely logical that the steward will employ his office in appropriate cases so as to limit formal grievances to those which involve differences of substantial merit. Whether this objective is accomplished will depend on the good faith of the parties, and whether they are amenable to reason and persuasion.

Therefore, in general, the accepted view is that "an employee is entitled to the presence of a Committeeman at an investigatory interview if he requests one and if the employee has reasonable grounds to fear that the interview may be used to support disciplinary action against him."[11]

4. It is said that protection from coerced attendance without union representation at an interview in which the risk of discipline reasonably inheres is not conferred by the Act but can be secured only by contract for which the employees have a statutory right to bargain and strike (*supra*, p. 13). Confinement of protection to contract rests on *ipse dixit* alone. Union representation is in its essence concerted activity for mutual aid or protection; safeguarding the worker's refusal to confront his employer in an adverse situation without union representation is at the heart of the Act; and statutory protection in this situation harmonizes with actual industrial practice. The protection which the statute confers is of course often supplemented and refined by contract.[12] The substance of the statutory right may be enhanced by partic-

[11] *Universal Oil Products Co.*, 60 LA 832, 834 (B. M. Shieber, 1973). See also, *Allied Paper Co.*, 53 LA 226 (J. F. Holly, 1969); *Pick-N-Pay Supermarkets*, 52 LA 832 (R. W. Haughton, 1969); *Thrifty Drug Stores Co.*, 50 LA 1253, 1262 (C. A. Jones, 1968); *Waste King Universal Products Co.*, 46 LA 283, 286 (J. D. Petree, 1966); *Dallas Morning News*, 40 LA 619, 623-624 (M. H. Rohman, 1963); *The Arcrods Co.*, 39 LA 784, 788-789 (E. R. Teple, 1962); *Valley Iron Works*, 33 LA 769, 771 (A. Anderson, 1960); *Schlitz Brewing Co.*, 33 LA 57, 60 (F. Meyers, 1959); *Singer Mfg. Co.*, 28 LA 570 (S. L. Cahn, 1957); *Braniff Airways*, 27 LA 892 (J. S. Williams, 1957); *John Lucas & Co.*, 19 LA 344, 346-347 (T. J. Reynolds, 1952).

[12] Dunau, *Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems*, 57 Col. L. Rev. 52, 66-80 (1957).

ularized contractual definition of its scope; realization of the statutory right may be furthered by contractual specification of the procedural means for asserting it; and incorporation of the statutory right into the contract performs the important function of eliminating debate as to its existence by the people on the factory floor who know their contract if not the law. Accordingly, the contract may facilitate vindication of the right, but it is the statute which creates it. Thus, discrimination because of union membership or nonmembership is prohibited by 40 percent of contracts,[13] but it can hardly be suggested that the right which the contract protects is therefore not statutory.

5. It is said that precedent belies the existence of the statutory right (*supra,* pp. 12-14). But such precedent as is in point is unpersuasive; much that is asserted as precedent is simply misunderstood; and the ossifying role which is assigned to precedent is fundamentally mistaken.

(a) Three decisions may be read as precedent adverse to the proposition that the Act protects an employee from coerced attendance without union representation at an interview with his employer which he reasonably fears may expose him to the risk of discipline. One is an obscure and cryptic 1947 decision of a court of appeals reversing a 1945 Board determination which is itself unclear and equivocal.[14] The other two are 1964 summary affirmances by the Board of trial examiners' decisions which are conclusory and

[13] Basic Patterns in Union Contracts, 95:2 (BNA, February 1971).

[14] *N.L.R.B.* v. *Ross Gear & Tool Co.*, 158 F.2d 607, 611-614 (C.A. 7, 1947), setting aside, 63 NLRB 1012, 1033-34 (1945).

unreasoned.[15] The search for the right reading of a statute should not atrophy with the first judicial rejection of an administrative determination, nor with unexplained agency affirmances of two trial examiners' decisions.

(b) The second line of precedent, said to be contrary to the Board's interpretation, is simply misunderstood and is not adverse at all. The Board's settled position, adhered to in this case, distinguishes between an investigatory interview and a disciplinary interview: (*i*) as here, the Board found that the requested interview was investigatory, and at such a fact-gathering and exploratory interview, the employer has the option not to meet with the union representative so long as he chooses to forego the interview with the employee; (*ii*) in contrast, at a disciplinary interview of an employee, where the employee is to be disciplined or the decision to discipline him is to be made, the employer has an indefeasible statutory bargaining obligation to meet with the union representative (*supra,* p. 10). It is this distincton which is misinterpreted. It is argued that, since the employer's statutory obligation to meet with the union representative is confined to a disciplinary interview of the employee, it necessarily follows that the employer can coerce the unrepresented attendance of an employee at an investigatory interview of him. But the logic of this argument is quite obviously fallacious. That the statute does not compel the employer to meet with the union representative does not mean that the statute allows the employer to compel the employee's submission to an interview without the union representative. Rather,

[15] *Dobbs Houses*, 145 NLRB 1565, 1570 (1964); *Electric Motors and Specialties*, 149 NLRB 1432, 1440 (1964).

each has equivalent freedom, the employer the liberty not to meet with the union representative, and the employee the liberty not to meet without the union representative. For example, an employer may not discharge his unorganized employees who walk off the job in a body because he has ignored their complaint about the lack of heat in the plant. *N.L.R.B.* v. *Washington Aluminum Co.*, 370 U.S. 9 (1962) Yet, since those same workers do not have a statutory bargaining representative, the employer is under no obligation to meet and confer about the cold in the plant. In short, an employer is not free to coerce his employees in their exercise of a right protected by section 7 simply because the employer is not under an additional statutory obligation to bargain. It is this simple and basic distinction that the Board has perceived but the courts miss. As the Board has stated, "while the employer's denial of . . , a request [by an employee to be represented by his union] may not derogate the bargaining rights of the union, in violation of Section 8(a)(5), in the case of a purely investigatory interview, this is not say either: (a) that the employer may discipline the employee for demanding representation; or (b) that the employer may insist, by threatening to discipline the employee's representative, that the interview be held without his presence" (A. 19; *infra*, p. 6a).

(c) The role of precedent has in any event been fundamentally misconceived. Adjudication within the common law tradition is often tentative at the beginning, with some backing and filling as the scope of the problem is better appreciated under the impress of continuing exposure to different manifestations of it, and with the formulation of a definitive position necessarily deferred until the ripeness of time has

revealed in full dimension the considerations pertinent to the solution. This is especially true of the administrative process when it works well. " 'Cumulative experience' begets understanding and insight by which judgments . . . are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process." *N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 349 (1953) "The nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick definitive formula as a comprehensive answer. And so, it is not surprising that the Board has more or less felt its way . . . , and has modified and reformed its standards on the basis of accumulating experience." *I.U.E.* v. *N.L.R.B.*, 366 U.S. 667, 674 (1961). To freeze development in the name of precedent contradicts the genius of the process. " 'Wisdom too often never comes, and so one ought not to reject it merely because it comes late.' " *Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235, 255 (1970) (Stewart, J., concurring).

6. We do not know why the Board has not sought certiorari in this case. The question is important and recurrent. It has been amply considered at the administrative and judicial levels so that no further illumination can be expected from additional scrutiny. And judicial review, while adverse, has not disclosed any deficiency in the Board's rationale which might persuade it to recede from its position. Accordingly, as this Court noted on an earlier occasion, where the Court granted certiorari and unanimously reversed the decision below on the petition of the private party although

the Board had declined to seek certiorari, but for the private party's petition "the decision of the Government not to apply for certiorari . . . would have unnecessarily postponed resolution on that important issue." *International Union, United Automobile Workers* v. *Scofield,* 382 U.S. 205, 214 (1965). So here, the time for decision is now.

CONCLUSION

When all is said and done, the stark fact remains that an employer has discharged an employee, and suspended and discharged her fellow-employees who are her union representatives, for no cause other than insistence on union representation. Protection from this raw exercise of economic power to squelch the mutual aid which is at the heart of union representation is within the plain unsophisticated reach of the National Labor Relations Act. The petition should be granted.

Respectfully submitted,

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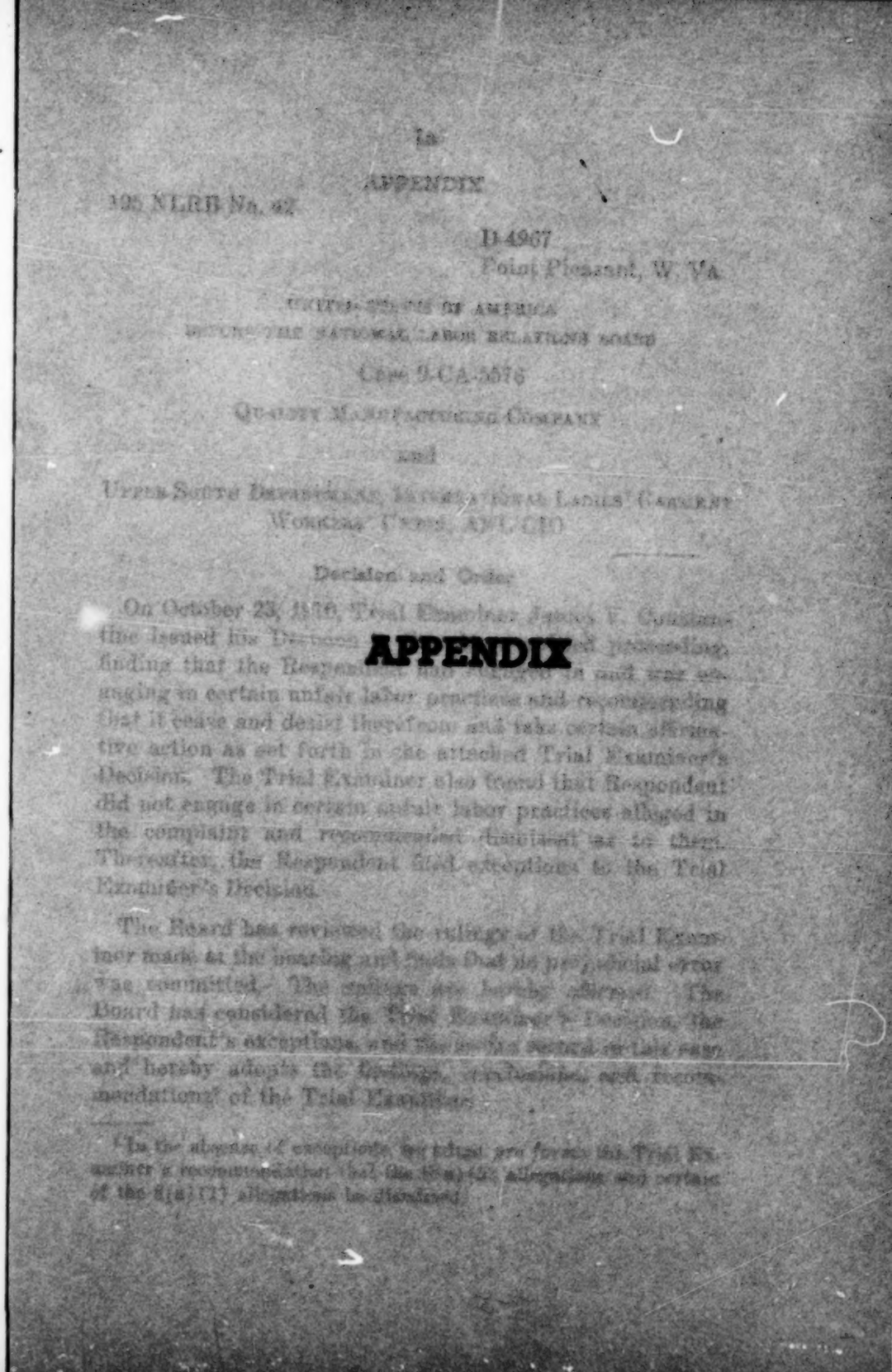

APPENDIX

195 NLRB No. 42

D-4967
Point Pleasant, W. Va.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 9-CA-5576

QUALITY MANUFACTURING COMPANY

and

UPPER SOUTH DEPARTMENT, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO

Decision and Order

On October 23, 1970, Trial Examiner James V. Constantine issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that Respondent did not engage in certain unfair labor practices alleged in the complaint and recommended dismissal as to them. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the Respondent's exceptions, and the entire record in this case and hereby adopts the findings, conclusions, and recommendations[1] of the Trial Examiner.

[1] In the absence of exceptions, we adopt *pro forma* the Trial Examiner's recommendation that the 8(a)(5) allegations and certain of the 8(a)(1) allegations be dismissed.

The Trial Examiner finds that Respondent violated Section 8(a)(3) and (1) by suspending employee Delila Mulford and Martha Cochran and by discharging Mulford, Cochran, and employee Catherine King. We agree.

Respondent is engaged in the manufacture of women's clothing. Its owners and principal officers are Lawrence Gerlach, Sr., president; Mary Kathryn Gerlach, his wife and production manager; and Lawrence Gerlach, Jr., their son and general manager.

The events which culminated in the suspensions and discharges began on the morning of Friday, October 10, 1969. On that morning all three Gerlachs met with Mulford, the union chairlady, and with King and two other employees during which meeting the union representatives complained that the employees, including King, could not make a satisfactory wage under the piece rate then in effect. The meeting produced only an acrimonious exchange and ended when Mulford was ordered to return to her work station.

Later that same day, while on the production floor, Mrs. Gerlach observed that King had shut down her machine and was causing some minor disturbance. According to Mrs. Gerlach, two other employees had also stopped their machines and were watching King. Mrs. Gerlach directed King to resume production. King responded with a flippant remark challenging Mrs. Gerlach's authority. Mrs. Gerlach then directed King to go to Mr. Gerlach's office. King complied, but en route she asked Mulford, the union chairlady, to accompany her. Mulford left her own work station and went with King to the anteroom of Gerlach's office where Mrs. Gerlach told her husband what had transpired.

Gerlach told Mulford to return to her work station and Mulford refused. Gerlach then told King to come into his office for a discussion, and King replied that she would not go without Mulford. At that, Gerlach told King and Mulford to return to their work stations, and they did so.

On Sunday, October 12, Mrs. Gerlach telephoned Mulford and informed her that she was suspended for 2 days. No reason for the suspension was given, but Mulford understood that it was for her activities in seeking to represent King on the previous Friday.

On Monday, October 13, King reported to work. She found that her timecard was not in its usual place in the rack, indicating pursuant to plant practice that she was wanted in Gerlach's office. Before going to his office, however, King asked assistant chairlady Cochran to accompany, and represent, her. Cochran accompanied King without first punching in on her timecard.

At the office, they talked first to Mrs. Gerlach, who told Cochran that her card was in the rack and that she should go to work if she wanted her job. Mrs. Gerlach added that they (the Gerlachs) wanted to talk only to King. When asked why, she replied that they wanted to take up where they left off Friday. Cochran then said, "Well, Mrs. Gerlach, I'm sorry, but if that's what you want to talk to her about, that is Union business and she has asked me to represent her."

Cochran and King then saw Gerlach and asked if he was going to give King her timecard. He responded that he would not do so until King came into the office and talked to him in private. When Cochran declared that King wanted union representation, Gerlach responded that he would talk to them one at a time. Cochran and King declined and then sat and waited in or near the office the rest of the day. Mrs. Gerlach, meanwhile, "pulled" Cochran's timecard.[2]

On Tuesday morning, October 14, Cochran and King again went to the office and asked Gerlach if he was going to give King her timecard. Gerlach again replied that he

[2] As Cochran subsequently learned, this action was taken to effect a decision to suspend Cochran for 2 days.

would not until King came into the office and talked to him in private. When Cochran asked about her own card, Gerlach replied that she was suspended 2 days for being away from her machine the prior day. King and Cochran then left the plant.

The next day, October 15, Mulford's 2-day suspension expired and she returned to the plant along with Cochran and King. Again, they went to the office and spoke with Gerlach. He informed Cochran that she was still suspended for another day and reiterated that he would not give King her timecard until she came into the office and talked to him in private. Cochran and King left. Mulford was given her timecard and went to work.

On Thursday, October 16, Cochran, Mulford, and King were discharged. That morning, too, the three went to the office and were met by Mr. and Mrs. Gerlach. Cochran was given her timecard and went to work. Mrs. Gerlach then told King that Gerlach wanted to see King in the office. King asked, "With Delila (Mulford)?" Gerlach said, "No, not with Delila." He added that if King "went out the door," that is to say, again declined the interview, she would be discharged. King walked out.

Mulford then asked Gerlach if she could go to work. "No," he replied, "You've abandoned your job. You're finished." He told Mulford to leave, and she did.

During the noon hour that same day, Cochran went to the office of Gerlach, Jr., and presented to him written grievances on behalf of herself, Mulford, and King. Gerlach, Jr., refused to take the grievances, saying that he did not have time for them as he was leaving town. Cochran insisted and laid the grievances on his desk, whereupon he picked them up and threw them into the trash. When Cochran left Gerlach, Jr.'s office, he went up to the work area and pulled Cochran's timecard. Later in the day, the senior Gerlach confirmed the decision to discharge Cochran.

I. The Discharge of King

We turn first to the question whether Respondent violated Section 8(a)(1) and (3) of the Act by discharging King because she insisted on union representation at the meeting which Respondent demanded. We affirm the Trial Examiner's finding that the Act was violated.

The issue presented by King's discharge was not decided by either the Board or the court in *Texaco, Inc.*, 168 NLRB 361, enforcement denied 408 F.2d 142 (C.A. 5, 1969). The issue posed in *Texaco* was whether the employer violated its obligation to bargain with an employee representative by denying an employee's request that a union representative be present during an interview conducted for the purpose of perfecting a case against the employee. The Board held that such a denial violated Section 8(a)(5) of the Act, and the court disagreed holding that the interview was merely investigative in nature. The Board has since refused to find 8(a)(5) violations under circumstances involving purely investigatory interviews. *Chevron Oil Company*, 168 NLRB 574; *Jacobe-Pearson Ford, Inc.*, 172 NLRB No. 84; *Texaco, Inc., Los Angeles Sales Terminal*, 179 NLRB 976.

But none of those cases presented a situation where an employee or his representative had been disciplined or discharged for requesting, or insisting on, union representation in the course of an interview. In fact, the Section 7 right of individual employees to act in concert "for mutual aid and protection" was not directly considered in those cases. Rather, those cases involved a determination of whether the right of the union to bargain collectively was such that an employer could not legally deny its request to participate in the interview.

This case, therefore, appears to present an issue which we have not heretofore directly passed on, and the *Texaco* line of cases relied on by the Examiner does not provide direct guidance for us here.

After reflection, we have concluded that it is a serious violation of an employee's individual right to be represented by his union if he can only request or insist on such representation under penalty of disciplinary action. And while the employer's denial of such a request may not derogate the bargaining rights of the union, in violation of Section 8(a)(5), in the case of a purely investigatory interview, this is not to say either: (a) that the employer may discipline the employee for demanding representation; or (b) that the employer may insist, by threatening to discipline the employee's representative, that the interview be held without his presence.

As to the first question, the violation seems to us clear and unequivocal. As to the second, while the question is more difficult, upon reflection we conclude the answer is the same. In *Texaco, supra,* when the employee asked to be represented in the interview, the employer advised that it would not insist on the interview unless the employee was willing to enter the interview unaccompanied by his representative. This seems to us to be the only course consistent with all of the provisions of our Act. It permits the employer to reject a collective course in situations such as investigative interviews where a collective course is not required but protects the employee's right to protection by his chosen agents. Participation in the interview is then voluntary, and, if the employee has reasonable ground to fear that the interview will adversely affect his continued employment,[3] or even his working conditions, he may choose to forego it unless he is afforded the safeguard of his representative's presence. He would then also forego whatever benefit might come from the interview. And, in that event, the employer would, of course, be free to act on

[3] "Reasonable ground" will of course be measured, as here, by objective standards under all the circumstances of the case. We believe our dissenting colleague errs in asserting that "reasonable ground" must be treated as a purely subjective matter.

the basis of whatever information he had and without such additional facts as might have been gleaned through the interview.[4]

This seems to us to be the proper rule where, as here, the interview, whether or not purely investigative, concerns a subject matter related to disciplinary offenses. We would not apply the rule to such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques. In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus we would then see no reasonable basis for him to seek the assistance of his representative.

In the instant case, we find that King had a reasonable basis for desiring union representation and that Respondent discharged King because she was insisting on that right.[5] There can be no doubt that under the facts and circumstances of this case King had reasonable grounds to believe that disciplinary action might result from the Employer's investigation of her conduct. Under these circumstances King reasonably requested union representation. It is also clear that Respondent discharged King for

[4] Here also, our dissenting colleague asserts that we will be compelled to resort to purely subjective considerations in judging employer conduct. We disagree. Whether discipline was imposed for cause, or for discriminatory reasons, is a factual matter with which we regularly deal in cases of 8(a)(1) and 8(a)(3) violations. In literally thousands of cases, this Board has determined whether pretextual reasons were advanced, and we have done so without floundering hopelessly in the elusive subjective considerations conjured up in dissent.

[5] For the reasons set forth by the Trial Examiner, we find that King had not, as Respondent contends, abandoned her job. Respondent does not contend that King was discharged for her actions on October 10, nor would the record support such a contention.

insisting on this right. Therefore, we conclude that King's discharge was in violation of Section 8(a)(1).[6]

II. The Suspension of Mulford and Cochran; the Discharge of Mulford

Turning next to Respondent's suspensions of Mulford and Cochran, Respondent claims that both employees were suspended for being away from their machines without permission. The Trial Examiner finds this reason was pretextual. There is ample evidence in the record to support, and we adopt, this finding. In particular, we note that Mrs. Gerlach testified that union chairladies had left the working floor in the past on union business without being disciplined. It follows that the disparate treatment here was motivated by the Respondent's desire to punish Mulford and Cochran for performing their duties as union chairladies in seeking to represent King at the conference Respondent requested. As such conduct is a protected concerted activity, the suspensions violated Section 8(a)(1) of the Act.[7]

As to Mulford's discharge, it is quite clear that Respondent took this action because Mulford was insisting on representing King. Respondent claims that it did not discharge Mulford but that she abandoned her job. However, we find no merit in this contention as it is clear, for the reasons stated by the Trial Examiner, that Respondent in fact discharged Mulford. Moreover, it is clear that the reason Respondent discharged Mulford was her insistence

[6] We deem it unnecessary to determine whether the discharge also violated Sec. 8(a)(3), as such additional finding would not affect our remedial order.

[7] This case is distinguishable from *Emerson Electric*, 185 NLRB No. 71 (Member Jenkins concurring) in that the action taken against the two employees was in fact taken because they had left their work stations without permission, whereas in the instant case that reason was pretextual.

on representing King. Thus she was discharged for engaging in a protected concerted activity, and the discharge violated Section 8(a)(1) of the Act.[8]

III. The Discharge of Cochran

Finally, as to Cochran's discharge, it is clear that Respondent discharged Cochran because she sought to engage in a protected concerted union activity, filing grievances on behalf of herself, Mulford, and King.[9] Thus her discharge was in violation of Section 8(a)(3) and (1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner and hereby orders that Respondent, Quality Manufacturing Company, Point Pleasant, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's recommended Order, as herein modified:

1. Delete paragraph 1(b) of the recommended Order and substitute the following:

"(b) Disciplining any employee for requesting to be represented by a labor organization at any interview or meeting held with the employee where the employee has reasonable grounds to believe that the matters to be discussed may result in his being the subject of disciplinary action."

[8] We deem it unnecessary to determine whether the discharge also violated Sec. 8(a)(3) as such additional finding would not affect our remedial order.

[9] As in the cases of Mulford and King, Respondent contends that it did not discharge Cochran but that she abandoned her job. We find no merit in this contention as it is clear, for the reasons stated by the Trial Examiner, that Respondent in fact discharged Cochran.

2. Reletter paragraph 1(c) as paragraph 1(f) and insert the following paragraphs 1(c), 1(d), and 1(e):

"(c) Requiring, under threat of discipline, that any employee take part in an interview or meeting without union representation, where such representation has been requested by the employee and where the employee has reasonable grounds to believe that the matters to be discussed may result in his being the subject of disciplinary action."

"(d) Discriminating against union chairladies for seeking to represent employees at any meeting held with an employee where the employee has reasonable grounds to believe that the matters to be discussed may result in his being the subject of disciplinary action and the employee has requested such representation."

"(e) Discriminating against union chairladies for seeking to file grievances."

3. In footnote 3 of the Trial Examiner's Decision change "10" to "20" days.

4. Substitute the attached notice for the Trial Examiner's notice.

Dated, Washington, D.C.

January 28, 1972

EDWARD B. MILLER, Chairman
JOHN H. FANNING, Member
HOWARD JENKINS, JR., Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

MEMBER KENNEDY, dissenting in part and concurring in part:

I concur with the decision of my colleagues that the discharge of employee Cochran because, as assistant chairlady, she sought to file grievances on behalf of herself and employees Mulford and King violated Section 8(a)(3) and (1) of the Act. However, because I am of the view that their decision is not supported by the facts and the law, I must dissent to my colleagues' conclusion that the discharge of employee King, the suspension of employees Mulford and Cochran, and the subsequent discharge of Mulford violated Section 8(a)(1), which proscribes interference with, restraint, or coercion of employees in the exercise of rights guaranteed in Section 7.

My colleagues have concluded that it is a violation of Section 8(a)(1) for an employer to discipline an employee who insists on union representation when summoned to an interview with the employer, regardless of whether such interview is investigatory or disciplinary. As I construe their holding, my colleagues seem to say that the right to union representation at such an interview stems not from Section 8(a)(5), as in the *Texaco* case, but directly from Section 7 relating to the right to engage in concerted activities for mutual aid or protection. In my opinion, such holding has no statutory support.

The majority would relegate to the employee whom the employer wishes to interview the determination whether such interview is to be disciplinary or "run-of-the-mill shop-floor conversation." In the event the employee has "reasonable grounds to believe" that disciplinary action might result from the interview, such employee could insist on union representation without fear of discharge or other consequences for such insistence. No suggestion is contained in the majority decision for the standards to be used in testing for "reasonable ground" or for "reasonable basis" for fear that the interview will have an adverse

impact upon the employee's employment status. My colleagues' holding reposes solely in the employee a determination as to the nature and scope of the interview, and makes such employee's state of mind conclusive as to whether the interview may be held with or without union representation. The employer's purpose for the interview, i.e., whether it is to be investigatory or disciplinary, is, under the majority decision here, largely irrelevant. Presumably, the employee whom the employer desired to interview would be under no obligation to disclose to the employer his state of mind or the reason why he desired to be represented by the union. The "reasonable grounds to believe" that disciplinary action might result from the employer's interview with the employee would not have to be revealed. Even in circumstances where the employer assures the employee that the interview is to be purely investigatory the employee could, based wholly upon his own state of mind, decline to participate, unless union representation is permitted him.

Although my colleagues seem to imply that the employer is free to discipline an employee if he suspects the employee is engaging in improper conduct, he must do so only after an interview at which the employee has been represented by the union, if the employee has requested representation, or before an interview with the employee is requested. To do otherwise could subject the employer to a complaint that the discipline was for insistence on union representation. If disciplinary action is taken after a request for an interview, which interview is declined by the employee unless union representation is permitted, the employee will undoubtedly have to defend himself from an unfair labor practice charge at which the only issue will be the reasonableness of the grounds for the employee's belief that the interview was to be disciplinary in nature. In any such proceeding, only the employee's subjective state of mind will presumably be examined, and the violation

will turn not on any objective considerations but on the subjective state of mind of the employee.

The Board has long held that in testing for interference, restraint, and coercion under Section 8(a)(1) the subjective state of mind of an employee is largely immaterial. *Forest Oil Corporation*, 85 NLRB 85. "Subjective state of mind of employees is of little weight" in determining whether Section 8(a)(1) is violated. *B. M. C. Manufacturing Corporation*, 113 NLRB 823, 825, footnote 8. See also *Bon-R Reproductions, Inc.*, 134 NLRB 429. "To the extent that the testimony in question may disclose the subjective state of mind of the employees . . . it is well established that the test to be applied to determine whether an employer's conduct was violative of the Act is an objective rather than a subjective one. *N.L.R.B.* v. *Link-Belt Co.*, 311 U.S. 584, 588." *The Rein Company*, 114 NLRB 694, 698.

The majority decision here has the effect of reversing a long line of cases by now holding that conduct of an employer can and will be judged as privileged or violative of the Act depending on how it is interpreted and construed by the employees involved and in what state of mind such conduct actually places such employees. In my view, such holding is contrary to sound interpretation and administration of the Act and is completely unwarranted.

Moreover, the vagueness of the holding of my colleagues here creates myriad and insurmountable problems of implementation and effectuation, not only for the Board, but for employers and unions as well. For instance, how will an employer be able to investigate theft of his products without access to his employees whom he may not suspect of having participated in such thefts but who may have information leading to solution of the crime? The employer may not wish to expose to outsiders knowledge of the thefts or the fact that he is conducting an investigation. Under the holding of my colleagues here, efforts of an employer to uncover such thefts by talking to employees

not involved in them but possibly having valuable information on them could be completely frustrated. If an employer discharges an employee for refusal to participate, unrepresented, in an interview concerning such thefts, in circumstances where the employee was not suspected of having engaged in stealing but did have information concerning the crime, and if such employee filed an unfair labor practice charge, what information will the employee be required to disclose to the Board agent investigating the case to establish a *prima facie* case and to justify a conclusion that he had reasonable ground to believe that disciplinary action would result from the interview with the employer? Shall the union be deemed guilty of an unfair labor practice when it is unable or unwilling to furnish a representative to accompany an employee to an interview with the employer? Other than serving as a witness in the interview, what function will the union representative be required to perform in the discharge of the union's status as collective-bargaining representative?

My colleagues would free an employer to discharge an employee who he suspects would be unwilling to take part in an interview unrepresented by the union. The validity of such discharge would then presumably be tested under the grievance-arbitration provisions of the collective-bargaining agreement. Such holding does not promote an investigation before drastic action is taken and in my view does not accord with the purpose and policy of the Act as set forth in Section 1(b); i.e., to provide orderly and peaceful procedures for preventing the interference by either the employees or employers with the legitimate rights of the other. I am of the opinion that the encouragement of the practice of putting into motion the machinery of inquiry before drastic action is taken would better serve the purposes of the Act.

Although my colleagues appear to have in large part premised their decision on their conclusion that it is a

serious violation of an employee's individual right to be represented by his union if he can only request or insist on such representation under penalty of disciplinary action, the statute, as written and interpreted, does not, in my view, protect employees from violation of each and every individual right. In *Lafayette Radio Electronics Corp.*, 194 NLRB No. 77, we recently affirmed a Trial Examiner's Decision dismissing an 8(a)(5) and (1) complaint based on an employer's refusal to permit a union representative to be present during the employer's interrogation of employees about alleged thefts. There, we affirmed the Trial Examiner's rejection of the contention that the principle underlying the Supreme Court's decision in *Escobedo* v. *State of Illinois*, 378 U.S. 478, should be made applicable in employee interrogations. We rejected the argument that in employer-employee interrogations there exists a statutory right to union representation and said, in effect, that if any such right exists it is a contractual right. Similarly here, the right to union representation during an interview with the employer must, in my view, be based on contract. It should be the subject of the collective-bargaining process like any other term or condition of employment.

With respect to the suspension of employees Mulford and Cochran, and the subsequent discharge of Mulford, I would find that the suspensions and the discharge were the result of their having left their work stations. *Emerson Electric Co.*, 185 NLRB No. 71; *Russell Packing Company*, 133 NLRB 194; *Terry Poultry Company*, 109 NLRB 1097.

Dated, Washington, D.C.

RALPH E. KENNEDY, Member
NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT discourage membership in Upper South Department, International Ladies' Garment Workers' Union, AFL-CIO, or any other labor organization, or discourage activities protected by the National Labor Relations Act, by suspending or discharging employees or otherwise discriminating in any manner in respect to their tenure of employment or any term or condition of employment.

WE WILL NOT discipline any employee for requesting to be represented by a labor organization at any interview or meeting held with the employee where the employee has reasonable grounds to believe that the matters to be discussed may result in his being the subject of disciplinary action.

WE WILL NOT require any employee to take part in an interview or meeting where the employee has reasonable grounds to believe that the matters to be discussed may result in his being the subject of disciplinary action and where we have refused that employee's request to be represented at such meeting by a labor organization.

WE WILL NOT discriminate against union chairladies for seeking to represent employees at any meeting held with an employee where the employee has reasonable grounds to believe that the matter or matters to be discussed may result in his being the subject of disciplinary action and the employee has requested such representation.

WE WILL NOT discriminate against union chairladies for seeking to file grievances.

WE WILL offer Catherine King, Delila Mulford, and Martha J. Cochran each immediate and full reinstatement to her former position or, if such position no longer exists, to a substantially equivalent one, without prejudice to the seniority and other rights and privileges enjoyed by each, and make each whole for any loss of pay she may have suffered, with interest at the rate of 6 percent, by reason of her discharge (including also suspension of Mulford and Cochran).

All our employees are free to become, remain, or refuse to become or remain, members of said Upper South Department, or any other labor organization.

QUALITY MANUFACTURING COMPANY
(Employer)

Dated ..... By .....
(Representative) (Title)

We will notify immediately the above-named individuals, if presently serving in the Armed Forces of the United States, of the right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Office Building, Room 2407, 550 Main Street, Cincinnati, Ohio 45202, Telephone 513—684-3686.

TXD-627-70
Point Pleasant, W. Va.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case No. 9-CA-5576

In the Matter of

QUALITY MANUFACTURING COMPANY and
UPPER SOUTH DEPARTMENT, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO

Cassius B. Gravitt, Jr., Esq., for the General Counsel, NLRB.

Bernard W. Rubenstein, Esq., Baltimore, Md., for the Charging Party.

John E. Jenkins, Esq., Huntington, W. Va., for the Respondent.

Trial Examiner's Decision

JAMES V. CONSTANTINE, Trial Examiner: This is an unfair labor practice case brought pursuant to Section 10(b) of the National Labor Relations Act, herein called the Act. It was generated by a charge filed on March 19, 1970, by Upper South Department, International Ladies' Garment Workers' Union, AFL-CIO. Said charge names Quality Manufacturing Company as the Respondent.

Thereafter on May 25, 1970, the General Counsel of the National Labor Relations Board, herein called the Board, through the Regional Director of the Ninth Region (Cincinnati, Ohio), issued a complaint against said Respondent. In substance said complaint, which is based on the foregoing charge, alleges that Respondent violated Section 8(a)(1), (3), and (5), and that such conduct affects commerce within the meaning of Section 2(6) and (7), of the Act. Respondent has submitted an answer admitting some allegations in the complaint but denying that it committed any unfair labor practices.

Pursuant to due notice this case came on to be heard, and was tried before me, on August 5 and 6, 1970, at Point Pleasant, West Virginia. All parties were represented at and participated in the trial, and had full opportunity to adduce evidence, examine and cross-examine witnesses, file briefs, and present oral argument. Briefs have been received from the General Counsel and the Charging Party. A short memorandum has been submitted by Respondent.

This case presents the issues of whether Respondent

1. Refused to allow an employee to be represented by the Charging Party at a meeting called by Respondent to reprimand and discipline said employee.

2. Threatened to take reprisals against employees because of their union activities.

3. Suspended, or discharged, or did both to, employees because of union membership or activities, or because of protected concerted activities, or both.

4. Shut down its plant and laid off employees in its production and maintenance unit for about 12 days to discourage membership in, or activities for, their union, or to discourage them from engaging in protected concerted activities, or both.

Upon the entire record in this case, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. As to Jurisdiction

Respondent, a West Virginia corporation, is engaged at Point Pleasant, West Virginia, in manufacturing women's clothing. During the year preceding May 25, 1970,

when the complaint herein issued, Respondent sold and shipped products valued in excess of $50,000, directly to customers located outside the State of West Virginia. I find that Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the policies of the Act to assert jurisdiction over Respondent in this proceeding.

II. The Labor Organization Involved

Upper South Department, International Ladies' Garment Workers' Union, AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *General Counsel's Evidence*

On or about October 24, 1968, the Union won an election to become, and on or about November 1, 1968, it was certified as, the exclusive bargaining representative of Respondent's employees in an appropriate unit. Thereafter the parties negotiated and executed a collective bargaining agreement. The answer concedes that said unit consists of Respondent's production and maintenance employees, excluding all office clerical employees, professional employees, and guards and supervisors as defined in the Act.

1. The suspension and discharge of Martha J. Cochran

Martha Cochran was employed as a machine operator by Respondent. While so employed she was secretary-treasurer and assistant shop chairlady for the Union at Respondent's plant. As assistant chairlady she represented, during the absence of the chairlady, employees in presenting grievances to management. She also served on the Union's negotiating committee.

On the morning of October 13, 1969, employee Catherine King asked Cochran to represent King on a grievance.

Agreeing to do so, the two went to Mr. Gerlach's office. However, they first talked to Mrs. Mary Gerlach, Respondent's production manager. But Mrs. Gerlach warned Cochran to go back to work "if you want your job." Continuing, Mrs. Gerlach stated that "we want to talk to [King] . . . where we left off Friday." At this point Cochran stated "that is union business and [King] has asked me to represent her." King refused to talk to Mrs. Gerlach without Cochran's being present "as Union representative."

Soon Cochran and King met with Gerlach, Sr. When Cochran asked him if he was going to give King the latter's timecard, he replied that he would not until King "came into the office and talked to him in private." Although Cochran protested that King "wants representation," Gerlach insisted he would talk to them "one . . . at a time." When Cochran asked him what he wanted to talk to King about, Gerlach replied that it was none of Cochran's business. Cochran remained there with King, and told Gerlach they would "sit out there [outside the office] until [he] decided to give [King] her card." Soon Cochran's card "was pulled" at about 7:30 a.m.

On October 14 Cochran entered the plant to work. Again she accompanied King to the office of Gerlach, Sr., and asked him if he was going to give King the latter's timecard. Gerlach answered that he would do so only if King came into his office to "talk to him in private." When Cochran asked for her own timecard, Gerlach replied that she was suspended—"penalized"—for 2 days for being away from her machine. Thereupon Cochran and King departed from the plant.

The next day King and Cochran, accompanied by employee Delila Mulford, went to the office of Gerlach, Sr., at about 7 a.m. When Mulford asked for King's card, Gerlach said he would not give it until King saw him alone in his

office. Then he informed them that Cochran was still suspended. Thereupon the three left.

On October 16, her suspension having ended, Cochran reported for work. Accompanied by King, Cochran went to Mrs. Mary Gerlach at about 7:20 a.m. Soon Delila Mulford joined them. Although Cochran worked that morning, King and Mulford did not. At the close of the lunch hour, i.e., at about 11:50 a.m., Cochran presented some written grievances to Gerlach, Jr. But Gerlach refused to entertain them on the ground that he was "leaving town." So Cochran placed the written grievances on Gerlach's desk. However, Gerlach threw them in the trash can.

Shortly after the last described incident Gerlach "pulled" Cochran's timecard, and then told Cochran "you're not working this afternoon. You're nothing but a damn smart aleck." This caused Cochran to call on Gerlach, Sr. When Cochran asked if Gerlach, Jr., had fired her, Gerlach, Sr., replied, "You heard what he said. You worked this morning but you're not working this afternoon." When Cochran asked what she was supposed to do, Gerlach, Sr., replied "Just go on home . . . and draw unemployment." As she left Cochran accused Gerlach, Sr., "you don't know how to run a business."

Later that day Cochran telephoned Katherine Stephens, Respondent's secretary, inquiring whether "Mr. Gerlach" wanted her to report back to work the next day. Stephens replied that he did not. Thereupon Cochran informed Stephens that Mr. Gerlach could reach her at Cochran's home phone when he needed her. However, Cochran has neither been called since then nor otherwise been notified to return to work.

Respondent has a policy of requiring employees to obtain permission to leave a work station. The president of the Union's local, Alice Hoschar, always obtained permission

to leave the floor to discuss union matters with management.

2. The suspension and discharge of Delila Mulford and the discharge of Catherine King

Mulford was employed by Respondent to piece skirts. She also served as the Union's chairlady at Respondent's plant. Respondent was notified by Union Business Agent Elizabeth Wiley and by Mulford that Mulford had been selected to act as such chairlady. On about October 1, 1969, Mulford presented a written grievance on behalf of an employee to Gerlach, Jr. He replied that he was "not going to fool with that grievance, that he was going to close the plant down around December the 1st."

On October 10, 1969, Mulford as chairlady met with Mrs. Gerlach, Gerlach, Sr., and Gerlach, Jr., to discuss piece rates including that of Catherine King. During the conversation Gerlach, Jr., told Mulford that if she "did not like the way it was there in the company to go elsewhere." Mulford had not obtained permission to leave her work station on this occasion, and the Gerlachs told her to go back to work.

Later that day, as a result of differences between Mrs. Gerlach and employee Catherine King, Mrs. Gerlach ordered King to go to the office. This caused King to ask Mulford to accompany her there. Although Mulford went with King, the former was ordered by Mrs. Gerlach and Gerlach, Sr., to return to her work station. However, Mulford replied that King, as a dues paying union member, was entitled to have Mulford present. Both Gerlachs retorted that Mulford was endangering her job by remaining there. Complying, Mulford returned to her work.

On Sunday, October 12, 1969, Mrs. Gerlach, by direction of Gerlach, Sr., telephoned Mulford not to report to work on the next 2 days, but to come in on the following Wednesday. Mulford knew, although she was not told, that she

was thus being suspended because she had left her job without permission on October 10. So Mulford remained at home on October 13 and 14.

On October 15, when Mulford returned to work, Gerlach, Sr., told her to mind her own business and that she was "going to get trouble" for not minding her own business. Mulford replied that she was minding her business, and that King "had a right to union representation as well as anybody else . . ." Gerlach replied that Mulford had been suspended 2 days "for coming off of the floor with Catherine King." However, Mulford refused to go to work until she "found out what was happening to" King and Cochran. Mrs. Gerlach, who was also present, answered that Cochran "was suspended yet," and that King "was wanted in the office without" Mulford. Then Mulford went back to work.

The next day, October 16, Mulford accompanied by King and Cochran, went to the outer office to ascertain "what was going to happen" to the latter two employees. Mrs. Gerlach instructed Cochran to go to work and directed King to see Gerlach, Sr., in the office without Mulford. Thereupon Gerlach, Sr., who was present, told King that "if she went out the door . . . she was finished." Since King refused to see Gerlach, Sr., without Mulford, King "didn't have anything else to do but to" leave, i.e., go out the door. At this point Mulford asked Gerlach, Jr., whether he wanted her to go to work. He replied, "No. You've abandoned your job. You're finished."

3. The layoffs of October, 1969

On October 28, 1969, machine operator Vonna Oliver and all the other machine operators were laid off by floorlady Helen Rice. At the same time Rice informed Oliver that "We've run the work out . . . I don't know when we'll call you back. Until this mess gets straightened up I just don't know." Sometime in early November, 1969, Oliver was called back to work. Another employee laid off by Rice on

October 29 or 30 is Alice Hoschar. Rice told her, "I'll am going to lay you off until this mess is straightened out." Hoschar returned to work on November 12.

4. Threats of reprisals

Alice Hoschar is president of the Union's local at Respondent's plant. On January [illegible] 1970, she asked Gerlach, Jr., why Mary Goodnight was taken off the operation Goodnight was performing and such operation was assigned to Maxine Warner, an employee with less seniority. Gerlach insisted he had a right to make such assignments. He also instructed Hoschar not to "come off the floor with a girl" during working hours. Later the same day Gerlach, Sr., told her that he had suspended Delila Mulford for "coming off the floor with King."

5. Other evidence in support of the complaint

About December 3, 1969, Joel Goolst, an organizer for the Union, requested Lawrence B. Gerlach, Jr., Respondent's general manager, to reinstate the above three discharged employees, i.e., King, Cochran, and Mulford. Gerlach refused, giving reasons. The reason he gave for denying reinstatement to Catherine King is that she "would not come into the office alone" but wanted "somebody else in the office when she presented her grievance," although for 25 years prior to this she had been a friend of the family and "talked directly to the family." He also explained that employees Mulford and Cochran were discharged because they came off the floor without permission to present a grievance as chairladies of the Union. The grievance was that of employee King. Chairladies are union representatives who present grievances on behalf of employees to management.

Continuing, Gerlach stated that he did not want a union, and hoped that the Union would "open up another factory in town and take the union people there" so that he "could

run his business without a union." Further, at this meeting Gerlach mentioned more than once that he did not understand why grievances had to be written and "why people couldn't come and talk to him as they have done in the past before the Union came around."

Goolst had previously requested reinstatement of said three employees about November 19, 1969. At that time Gerlach, Jr., denied this request for the same reasons mentioned at the foregoing meeting on December 3.

About November 19, 1969, Union Organizer Goolst talked to Respondent's General Manager, Lawrence B. Gerlach, Jr., requesting reinstatement of three employees. As noted above, Gerlach refused. Further, Gerlach stated he would close down before he reinstated these three employees and pointed out that he had closed the plant once before rather than take back a discharged employee named Joanne Sheets. Gerlach added that "I can do it again."

At the foregoing November 19 meeting Goolst also discussed with Gerlach the shutdown of Respondent's plant from October 28 to November 10, 1969. Gerlach insisted that he "did not want the work until this union thing gets straightened out," and that Gerlach so informed his supplier in Cleveland, Ohio, one Paul Marcus.

About January 12, 1970, Goolst again spoke to Gerlach, Jr., concerning the three discharged employees. This time Gerlach mentioned there was a possibility of taking them back "if we could work something out . . . if [the Union] would not press for any backpay money" and also dropped "charges or grievances" for such discharges. Gerlach also observed that "because the three troublemakers are out of the factory . . . there's no reason for any grievances. Everybody's happy."

About January 21, 1970, Goolst spoke to Lawrence R. Gerlach, Sr., Respondent's president, regarding the three discharged employees. Gerlach refused to take them back

because "their conduct in the plant and their conduct to him was such that he couldn't have them back . . . they no longer have respect" for management.

About October 20, 1969, Mrs. Elizabeth Wiley, a union business agent, spoke to Gerlach, Sr., about rehiring the three dischargees, i.e., King, Cochran, and Mulford. Gerlach replied that these three had been giving him a lot of trouble "and [King] didn't want to come into the office and talk to me without having union representation. And that I am not going to allow." Gerlach added that he did not further desire to discuss this problem or "any other damn union problem" or else he would "close the plant."

On about October 20, 1969, Mrs. Wiley asked Gerlach, Jr., to take back the three discharged employees. Replying, he objected that the Union was trying to tell him how to run his plant and that he would "close the plant" as he could not stand the "worry and aggravation."

On October 28, 1969, Mrs. Wiley spoke to Gerlach, Jr. Gerlach added that "it's a constant turmoil in here," and that he did not want any work "as long as I'm having all this union trouble." Nevertheless, in response to Wiley's question, Gerlach stated that his supplier, Marcus, could supply him with work. On October 30 Respondent laid off some employees.

On November 13, 1969, Wiley again asked Gerlach, Jr., to take back the three discharged employees. But Gerlach replied, "Absolutely not," because they were "nothing but trouble makers." On November 25 Wiley again interceded with him on behalf of these three employees, but without success. In fact Gerlach said he would close the plant if Respondent was "forced to bring them back."

B. *Respondent's Evidence*

Mary Kathryn Gerlach, Respondent's production manager, with her husband, Lawrence, Sr., and her son,

Lawrence, Jr. owns Respondent. A summary of her testimony follows.

Employees may not leave the work floor during working hours without first obtaining permission to do so from Mrs. Gerlach or floorlady Helen Rice. This had been a company rule from the beginning. At no time has the Union objected to such a rule.

Employee Catherine King worked for Respondent a number of years. During that time King "communicated or talked individually with members of the [Gerlach] family . . . lots of times." A few days prior to October 10, 1969, Catherine King was asked by floorlady Rice to lower the volume of a radio which King had turned on at the latter's work station. Upon hearing the noise from said radio Gerlach directed King to turn off said instrument not only because it "made a heck of a racket," but also because "a company rule [did not] allow [them] in the place." King complied with Gerlach's command.

Some days later, about October 10, King complained that she could not produce her quota. Thereupon King waved her arms and made other gestures at two other female employees who also could not make their quota, and soon their machines were stopped. When Gerlach asked King "what is wrong here . . . what's the commotion," King replied "something about a repair." At this, Gerlach admonished King to "fix it [or] . . . let one of the floor girls [fix] it . . . and quit causing this disturbance." Thereupon King told Gerlach to mind her own business and also "sassed" Gerlach. This caused Gerlach to ask King to accompany her to the office "to talk to Mr. Gerlach, Sr., about it." (Employee Mayme Taylor confirmed Mrs. Gerlach as to what transpired on this occasion.)

However, King asked Delila Mulford to come with her to the office. Mrs. Gerlach then told Mulford that this was not a grievance, that it did not concern Mulford, and directed Mulford to remain at her work station. In fact, Mrs. Gerlach "didn't consider it a union matter." Nevertheless, Mulford, without obtaining permission [1] to leave her work station, went along with Gerlach and King to the office. Mrs. Gerlach told Mr. Gerlach that Mulford was there without permission. Although requested, King refused to speak alone to Gerlach, Sr. Nevertheless the latter told Mulford to return to her machine as he intended to talk to King without Mulford being present. Mulford answered she had a right to be there to represent King, and refused to go back to work immediately. Gerlach, Sr., also told Mulford that she had no business there, that "it wasn't a grievance," that it did not concern Mulford, and to return to her station. Soon, however, Mulford did go back to work.

Mrs. Gerlach denies that she made any threats of reprisals to Mulford, or Hoschar, or any other employee, because of union or other protected activities.

Lawrence Gerlach, Jr., is a part owner of Respondent and its general manager. A summary of his testimony ensues.

Gerlach denies that Respondent's plant was closed between October 29 and November 10, 1969, to discourage membership in the Union. In talking to Union Organizer Goolst about this aspect of the charge in early 1970, Goolst told Gerlach that "it had no merit, that it was injected to give some and take some."

Respondent's principal supplier of work is Stanley M. Feil Company, owned by Paul Marcus of Cleveland, Ohio. Thus Feil is Respondent's only customer. In October, 1969, Respondent was "necessarily supposed to be working on"

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[1] On one occasion, and perhaps it was this one, Mulford presented a grievance, according to Mrs. Gerlach, "at noon hour" and not on working time. See pp. 205-206 of the Transcript. And Mulford's predecessor as chairlady, a Mrs. Holland, handled grievances during working hours without obtaining permission to leave her station. Id. 206.

certain styles for Feil which had been advertised. Patterns for these styles were furnished by Feil. But the piece goods, i.e., the cloth, for such styles, supplied by Mission Valley Mills of New Brownsville, Texas, had not become available at the time. Further, Respondent had piece goods for other styles but had not been supplied with patterns (or markers) for such styles. It is essential that Respondent "have the right patterns for the right goods" before production can start on any style. Hence Respondent in the fall of 1969 "couldn't make dresses." On November 3, 4, and 5, 1969, everybody was laid off but the cutter. The latter during this period performed maintenance work, as "he is too vital of an employee to take a chance on losing." The cutters were called back on the 6th of November.

As employees ran out of work on their particular operation they were necessarily laid off. When piece goods and patterns were received laid off employees were recalled "in the reverse order." But no production employee was laid off when there was work for him to do. Layoffs occur "about every season" because Respondent "did not have the right match of markers [patterns] and materials."

Gerlach also testified that he spoke to Goolst about the three discharges, i.e., King, Cochran, and Mulford, claiming that he told Goolst "we always need operators and two out of three of [the dischargees] was real good and anytime they would obey the same rules as the rest of them they had their job . . . My father wanted a letter though from them to that effect." Although Goolst replied these three would obey the rules Gerlach nevertheless wanted this assurance "put . . . into a letter form." He further testified that if he uttered any antiunion statements to Goolst they were uttered in jest or "horseplay." And Gerlach insisted that King, Cochran, and Mulford were not discharged but that "they abandoned their employment by their own action."

Gerlach also testified that the Respondent has a rule that "nobody leaves the stitching room floor without permission." And he denied threatening to take reprisals against an employee because of union activities, as alleged in paragraph 8(c) of the complaint.

During the noon or lunch hour of October 16, 1969, Martha Cochran asked Gerlach to discuss some grievances with her. He replied that, as he was going out of town, he could not then do so, but would take them up with her upon his return the following Monday. In fact, he would not even receive the written grievances at that time but wanted to wait until Monday. But Cochran insisted "By God, you'll take time" to consider the grievances at the time. Shortly thereafter Gerlach "pulled" Cochran's card and told her she would not be working that afternoon. When Cochran asked if she had been fired, Gerlach repeated that she would not be working that afternoon, but that she was not fired. (However, employee Mayme Taylor, who testified for Respondent, stated that although she heard Cochran asked if Cochran had been fired, Gerlach said nothing in reply. On the other hand, other witnesses for Respondent, testified that Gerlach answered that Cochran had not been fired.) Although Cochran shortly thereafter telephoned that "if we wanted her [to come back to work] we could call," Respondent never did call her back to work. Gerlach insisted that Cochran was sent home that afternoon because she barged in on him and demanded immediate consideration of some grievances.

Gerlach denied that he told Delila Mulford that the plant would be closed on December 1, 1969. Nor did the plant close on that day.

Explaining the discipline of King, Gerlach stated that she was so disciplined for violating a rule. On being cross-examined he referred to this rule as "a request to have a conference with an employer . . . alone," i.e., she demanded to have a union steward present with her. He "contended it is management's right to have a personal conference with

an employee." Gerlach, Sr., "wanted to speak to [King] in a private manner . . . about her conduct," according to Gerlach, Jr. "And if something there is said that is not right they have a grievance procedure to go through." But he added that King "violated [another] rule by causing a disturbance on the floor and also by playing a radio." However, Gerlach insisted that King was not fired but had "abandoned her job."

Mary Stephens, Respondent's secretary, in substance testified as follows. On October 10, 1969, a Friday, employees Catherine King and Delila Mulford came to the office. Mr. Gerlach asked King to see him alone, as he wanted to talk to her "a couple of minutes." At the same time Gerlach inquired of Mulford what she was doing there. When Mulford replied that "she came down with" King, Gerlach admonished her that Mulford wasn't supposed to come off the floor . . . that was against the rules." However, Mulford insisted she "would come off any time that she wanted to." Thereupon Gerlach directed Mulford to go back upstairs and he would decide what he would do about her attitude. Then Gerlach stated he wanted to talk to King alone. But both King and Mulford then left together, because King refused to speak to him alone.

The following Monday, October 13, King and Martha Cochran called on Mr. Gerlach. Stephens was present. Again Gerlach asked to speak to King alone for a couple of minutes. But King refused to speak to him unless Cochran was also present. At one point of the conversation King called Gerlach a hog.

On October 14, 1969, King and Cochran again came to the office. Gerlach repeated his desire to speak to King alone for "a couple of minutes," but Cochran insisted this could not be done as Cochran would have to be present during any such conversation. Although Gerlach then ordered Cochran to return to work, she refused to do so. Soon Cochran and King left the plant.

On October 15, King, Cochran, and Mulford came to the office. Soon Mulford went to work. Then Gerlach asked King to talk to him alone, but Cochran forbade this, insisting that she had to be with King. Not long after this King and Cochran went home.

The above three employees again came to the office on October 16. Cochran immediately went to work. Although Gerlach asked to speak to King alone, Mulford insisted on being present during the conversation. As King and Mulford left, Gerlach told them that "if you go out the door this time I consider you have abandoned your job as I have put up with you for a week on this." Nevertheless King and Mulford went out the front door and left the plant. At about 2 p.m. on October 16, 1969, Cochran telephoned Stephens that Cochran was not coming back to work until called back to work by Stephens. But Stephens never did call Cochran although it was part of the former's job to call back employees who had been laid off. However, Stephens insisted that she called back laid off employees only when told to do so, and she was not told to recall Cochran.

Stephens also testified that Respondent had adopted a rule that employees had to have permission to leave the sewing room floor during working hours, and that it had been in force for a considerable period of time before 1969.

Another important witness for Respondent is Paul Marcus. An abstract of his testimony follows.

Marcus is connected with Stanley M. Feil, Incorporated, of Cleveland, Ohio, a dress manufacturer. For several years Feil has given orders to Respondent. The latter fills said orders by supplying Feil with manufactured dresses. In this connection it is the responsibility of Feil to purchase the cloth for such dresses from various mills throughout the country and cause it to be shipped to Respondent to use in producing dresses for Feil. In addition Feil supplies Respondent with markers or patterns to be used in

making the dresses ordered by Feil from Respondent. Finished dresses are sold by Feil; they are shipped by Respondent to Feil's customers as directed by Feil. According to Marcus, Respondent manufactures exclusively for Feil and does no work for anyone else.

Mission Valley Mills of Brownsville, Texas, is one of those supplying Feil with cloth to be used by Respondent in fulfilling Feil's orders. In October, 1969, Mission shipped fabric to Feil which, because it was damaged, was unacceptable to Feil. Markers for such cloth had been furnished to Respondent by Feil. As a result, Respondent was unable to produce the styles of dresses which Feil intended to be made from this fabric. At that time Respondent had other good cloth on hand for other styles but had not received from Feil the markers necessary to produce dresses from such cloth.

As a consequence Feil sought to rectify the situation by (a) seeking to obtain first quality material to replace the damaged cloth, and (b) producing markers to be used by Respondent in utilizing the good cloth Respondent had on hand. As to (a), Feil was so desperate for cloth that it transported by air good materials obtained from Mission, an expensive and costly operation. Considerable time (about 3 weeks) elapsed before Feil was able to supply Respondent with acceptable cloth under (a) above, and markers under (b) above. See Respondent's Exhibit 4. During some of this time Respondent was forced to curtail operations and, therefore, laid off employees. Because these are seasonal dresses, Feil lost some money because dresses were not available for the entire season.

Respondent concluded the presentation of its defense with Lawrence K. Gerlach, Sr., its president. An abridgment of his testimony follows.

Gerlach has known employee Catherine King for several years. As an employee, King "made it a practice" to "visit" Gerlach's office daily and he sometimes called her

to the office as well. On October 10, 1969, Mrs. Gerlach, King, and Delila Mulford came to the office. Mrs. Gerlach complained of King's conduct which had "created quite an excitement [and] which stopped a lot of operators from working." Then Mrs. Gerlach left. Although Gerlach warned Mulford to return to work because it was against the rules to leave her work station without permission, Mulford insisted on staying with King.

At this point Gerlach invited King into the office alone so he could speak to her, but King refused unless Mulford also went in with her. Thereupon Gerlach instructed both to resume work. However, Gerlach asked Mrs. Gerlach to suspend Mulford for 2 days.

Just before work started on the following Monday, October 13, King came to the office accompanied by employee Martha Cochran. Notwithstanding that Gerlach requested Cochran to go to work, Cochran insisted on staying with King. And when Gerlach expressed a desire to speak to King she refused unless Cochran also remained with her. Shortly thereafter King called him a hog.

On October 14 King and Cochran again came to the office before work started. Although Gerlach requested Cochran to proceed to her work station, she persisted in staying there with King. When Gerlach asked King to speak to him alone, she refused. Soon both King and Cochran departed from the plant.

On October 15, King, Cochran, and Mulford appeared at the office. Although Gerlach told all three to report to work, only Mulford obeyed; Cochran refused. When Gerlach asked to speak to King, she refused to do so except in the presence of Cochran.

The next day the above three employees again showed up at the office. When Gerlach told them to go to work, only Cochran complied. Mulford insisted on staying there

with King. Although Gerlach asked to speak to King she refused unless "somebody else [was] with her." This caused Gerlach to remark, that they return to work or else he would consider they had abandoned their jobs when they "went out that door." Soon Mulford and King left the plant. Neither Mulford nor King has "come around" since then.

At noon on October 16 Cochran reported to Gerlach, Sr., that Gerlach, Jr., had fired her, and asked the former to confirm it in writing. But Gerlach, Sr., insisted that she had not been fired. At this Cochran told him that neither he nor any of his family had enough sense to run a business.

Gerlach denies that he ever told Union Officials Goolst and Wiley that Respondent would not take back King, Cochran, and Mulford.

C. *Concluding Findings and Discussion*

The burden of proof rests upon the General Counsel to establish his case by a fair preponderance of the evidence, and no obligation rests upon Respondent to disprove any of the allegations of the complaint. *Hawkins* v. *N.L.R.B.*, 358 F. 2d 281, 283-284 (C.A. 7). I have been guided by this precept in arriving at the findings which follow.

1. As to the suspension and discharge of Martha J. Cochran

It is my opinion, and I find, that Cochran was suspended for 2 days beginning October 14 for activity protected by the Act, i.e., representing employee King in Cochran's capacity as assistant chairlady of the Union. I find this violates Section 8(a)(1) and (3) of the Act. And I also find that the reason given her for suspending her, i.e., for being away from her machine without permission, is a pretext to disguise the true reason.

The foregoing findings are based on the entire record and the following subsidiary facts, which I hereby find:

a. Respondent had no written, posted, or oral rule against leaving a work station without permission. In this respect, I credit the General Counsel's witnesses and do not credit Respondent's evidence inconsistent with said finding. I recognize, and find, that employees may not leave their work station during work hours whenever they wish and that it is impliedly understood that permission must be obtained to leave for protracted periods of time. Hence I find it is not necessary to communicate to employees the necessity of remaining at work during working time unless excused therefrom.

Nevertheless, this unwritten rule against leaving a work station at will cannot operate to prevent a union steward from accompanying or representing an employee who requests union representation in a conference with the employer, especially when such conference may result in a reprimand or sterner discipline. For the Act guarantees union representation at such conferences; and written or unwritten rules which conflict with such guarantee are to that extent invalid.

Moreover the contract between the Union and Respondent overrides and renders ineffective any rule forbidding union representatives to leave a work station regarding grievances without permission. Nothing in said contract compels a union representative to obtain permission to discuss grievances with the employer. In fact the tenor of said contract implies that such permission is not a condition precedent. See Article XXIII, Section 1(a) and 2, where it is provided that

> 1. Any and all disputes, complaints, controversies, claims, or grievances whatever between the Union or any employees and the Employer which directly . . . relate to . . . the acts, conduct, or relations between the parties shall be adjusted as follows: (a) The Shop

> Chairlady, together with a representative of the Union, shall attempt to settle the matter with a representative of the Employer. . . . 2. It is intended that this provision shall be interpreted as broadly and inclusively as possible. (Charging Party's Exhibit 1.)

b. Cochran was the Union's assistant chairlady, and Respondent had actual knowledge thereof. Respondent's evidence denying such knowledge is not credited. In any event I find that such knowledge may be imputed to Respondent under the Board's small plant rule. And I find that Respondent operated a small plant. *Angwell Curtain Company, Inc.* v. *N.L.R.B.*, 192 F. 2d 899, 903 (C.A. 7).

In this connection I find that the meeting between King and Respondent related to King's alleged misconduct in connection with her duties and could result in a reprimand or severer discipline. *Texaco, Inc.*, 168 NLRB 361, 362. And I expressly find that such meeting did not seek information and was not investigatory in nature. Hence the Court's reversal of the Board in *Texaco, Inc., supra,* is not controlling. See 70 LRRM 3045, C.A. 5. Cf. *Texaco, Inc.*, 179 NLRB No. 157; *Jacobe, Pearson Ford, Inc.*, 172 NLRB No. 84; *Chevron Oil Company,* 168 NLRB 574, 579.

c. Respondent entertained antiunion animus and committed other unfair labor practices, as found herein. While I am aware that an employer may constitutionally oppose unions and is free to say so (*N.L.R.B.* v. *Threads, Inc.*, C.A. 4, 308 F. 2d 1, 8; *N.L.R.B.* v. *Howard Quarries,* C.A. 8, 362 F. 2d 236; *J. P. Stevens & Co., Inc.*, 181 NLRB No. 97, p. 4), nevertheless hostility to unions is a factor which may be appraised or evaluated in arriving at the true motive prompting a suspension or discharge. *N.L.R.B.* v. *Georgia Rug Mill,* 308 F. 2d 89, 91 (C.A. 5); *Maphis Chapman Corp.* v. *N.L.R.B.*, 368 F. 2d 298, 303-304 (C.A. 4).

d. Cochran was active in the union movement. She also was an experienced employee with a long service record.

Discipline of active union adherents, especially if they are experienced employees, is a factor which I have taken into consideration in determining the true reason behind Cochran's suspension.

It is true that "management can [discipline] for good cause, or bad cause, or no cause at all without incurring liability under the Act." *N.L.R.B.* v. *McGahey,* 233 F. 2d 406, 413 (C.A. 5). But "obviously the [discipline] of a leading union advocate is a most effective method of undermining a union organizational effort." *N.L.R.B.* v. *Longhorn Transfer Service, Inc.*, 346 F. 2d 1003, 1006 (C.A. 5). In this connection I have been mindful of the modern doctrine that direct evidence of a purpose to violate the statute is rarely available because employers have acquired sophistication as to how to get rid of union members for alleged lawful cause. *Hartsell Mills* v. *N.L.R.B.*, 111 F.2d 291, 293 (C.A. 4); *N.L.R.B.* v. *Melrose Processing Co.*, 351 F.2d 693, 698 (C.A. 8).

e. It is not necessary that protected activity be the only reason responsible for Cochran's suspension. If the suspension was inflicted substantially because of Cochran's protected activity it violates the Act notwithstanding a valid ground for discipline might exist. *Betts Baking Co.* v. *N.L.R.B.*, 380 F.2d 199 (C.A. 10); *N.L.R.B.* v. *Whitin Machine Works,* 204 F.2d 883, 885 (C. A. 1). I expressly find that Cochran's protected activity was a substantial—but not necessarily the only—reason for her suspension. Cf. *N.L.R.B.* v. *Symons Mfg. Co.*, 328 F.2d 835, 837 (C.A. 7); *N.L.R.B.* v. *Park Edge Sheridan Meats,* 341 F.2d 725, 728 (C.A. 2).

f. Finally, I find that membership in, or activities on behalf of, a labor organization, or both, do not immunize or shield an employee from punishment for cause. *Metals Engineering Co.*, 148 NLRB 88, 90; *Mitchell Transport, Inc.*, 152 NLRB 122, 123, affirmed sub nom. *Hawkins* v. *N.L.R.B.*, 358 F.2d 281, 283-284 (C.A. 7).

In my opinion *Emerson Electric Co.*, 185 NLRB No. 71, 75 LRRM 1028, does not compel a finding that Cochran was not engaged in protected activity. For in *Emerson* the employees who left their work stations to accompany a grieving employee held no office in the union and were not otherwise entitled or authorized to represent the union in grievance matters. But in the instant case Cochran was called upon by King to act as an official union representative. As such representative Cochran was engaging in activity fostered by the Act and the collective bargaining contract between Respondent and the Union. *Socony Mobile Oil Company,* 153 NLRB 1244, 1247, 357 F.2d 661 (C.A. 2).

On the afternoon of October 16, 1969, Gerlach, Jr., discharged Cochran for presenting written grievances to him. Respondent's evidence not consonant with this finding is not credited. I find this violates Section 8(a)(1) and (3) of the Act. Notwithstanding that Gerlach used the phrase "you're not working this afternoon," I find that Cochran was discharged, and that, contrary to Respondent's contention, she did not "abandon" her job. This conclusion is based on the entire record and the following subsidiary facts which I find:

(a) When Cochran confronted Gerlach, Sr., with the language of Gerlach, Jr., and asked Gerlach, Sr., what to do, Gerlach, Sr., instructed her to go home "and draw unemployment." It is reasonable to infer—and I do so—that this interpretation of Gerlach, Sr., refers to a permanent severance of Cochran from her job. This is because unemployment compensation is not payable for an afternoon but rather only for termination from work for at least a prescribed period of a minimum number of weeks. It would have been a simple matter to inform Cochran to return the next morning if Cochran had been suspended for the afternoon only. Yet Gerlach, Sr., refrained from saying so. It is true that Gerlach, Sr., also implied that

Cochran had not been fired, but he did not expressly say so. Hence it became incumbent upon Respondent, in view of the ambiguity of the language used by Gerlach, Sr., to make clear that Cochran was suspended only for the afternoon.

Although Cochran insulted Gerlach, Sr., during this conversation by telling him he did not know how to run a business, I expressly find that she was not discharged for uttering these words.

(b) Later that afternoon Cochran telephoned Respondent's secretary Stephens, as to whether Gerlach wanted Cochran to report to work the next day. It is significant that Stephens replied in the negative after consulting with Gerlach. Patently this reply points to the conclusion that Cochran had not been suspended for the previous afternoon only. And I find that it was reasonable on the part of Cochran, in view of said answer by Stephens, to tell Stephens that thereafter Cochran could be reached by telephone at her home when Respondent needed her. It was not necessary that Cochran constantly keep calling Respondent to ascertain when, if ever, she would be rehired. On this branch of the case I credit Cochran and do not credit that part of the testimony of Stephens inconsistent therewith.

(c) Nor did Cochran "abandon" her job. Nothing in the evidence which I credit points to this conclusion. Not only (1) did she fail to mention any such attitude as indicative of her construction of the phrase to "go home . . . and draw unemployment," but (2) at no time did Respondent notify her that it construed her absence from work as an abandonment of work. The Board has held that failure to show up for work does not amount to abandoning a job absent (a) evidence of intent to quit, or (b) notice to the employee that the employer no longer regards him as an employee. *Roylyn, Inc.*, 178 NLRB No. 33, 72 LRRM 1043.

(d) Finally, I find that Cochran was a union representative at the time she presented the written grievances to

Gerlach, Jr., that Respondent (for the reasons as delineated above in connection with her suspension) had knowledge that Gerlach was a union representative, and that her discharge under the circumstances contravenes Section 8(a)(1) and (3) of the Act. Cf. *Eastern Illinois Gas and Security Company,* 175 NLRB No. 108.

2. As to the suspension and discharge of Delila Mulford

On October 12, 1969, Mulford was suspended for engaging, on October 10, in activity protected by the Act, i.e., representing employee King in Mulford's capacity as chairlady of the Union. I find this suspension contravenes Section 8(a)(1) and (3) of the Act. In this connection I credit the General Counsel's evidence and do not credit Respondent's evidence insofar as it clashes with that of the General Counsel. And I find that Respondent's contention that Mulford was suspended for leaving her job without permission is a pretext to mask the true reason.

The above findings are based on the entire record and the following subsidiary facts, which I hereby find:

(a) For the reasons set forth above in finding that Cochran's suspension was unlawful I find that Mulford's suspension was unlawful and that it violates Section 8(a)(1) and (3) of the Act. Those reasons are hereby incorporated by reference and need not be repeated *verbatim.*

(b) As in the case Cochran, I find that Respondent had knowledge that Mulford represented the Union, i.e., as chairlady. But I find an additional reason existed in Mulford's case whereby Respondent was cognizant of her representative capacity. This additional reason is recited in the next two paragraphs. These two paragraphs summarize pertinent testimony adduced by Respondent at the trial of this case.

About October 10, Mrs. Gerlach, Respondent's production manager, invited employee King to talk to Mr. Gerlach,

Sr., about King's behavior which was disapproved by Mrs. Gerlach. Thereupon King requested Mulford to accompany King to the office. However, Mrs. Gerlach directed Mulford not to leave her work station, insisting to Mulford that this matter was "not a grievance." At the trial Mrs. Gerlach testified she "did not consider this a union matter." I find that the language used by Mrs. Gerlach towards Mulford reasonably connotes that the former was aware of the latter's capacity as a union representative. By referring to grievances and union matters in forbidding Mulford to come with King, Mrs. Gerlach must have known that Mulford was the union's representative on grievances and union matters. Otherwise there was no occasion to mention these subjects if Mrs. Gerlach believed that Mulford was invited to come merely as another employee without representative status.

When Mulford and King arrived at the office, Gerlach, Sr., told Mulford she had no business being there because "it wasn't a grievance." It is reasonable to infer—and I do so—that Gerlach would not have mentioned a grievance unless he had knowledge that Mulford was a union representative on matters relating to grievances.

On October 16, 1969, Mulford was discharged for engaging in protected activity, i.e., representing, in her capacity as union chairlady, employee King. This discharge violates Section 8(a)(1) and (3) of the Act, and I so find. I further find that Respondent's defense that Mulford abandoned her job is a pretext to cover up the true reason. This ultimate finding is based on the entire record and the ensuing subsidiary facts which I hereby find:

(a) Respondent had no express rule against leaving a work station without permission. Even if it had such a rule it was superseded as to union representatives protecting the interest of employees not only by the Act but also by the contract between Respondent and the Union.

(b) Respondent had knowledge that Mulford was the Union's chairlady, as more fully set forth above.

(c) Respondent entertained antiunion hostility and also committed other unfair labor practices. This conduct has probative value in ascertaining the actual reason for Mulford's discharge.

(d) Mulford was active in the union movement and also was an experienced employee with several years of service for Respondent.

(e) It is sufficient to find the discharge illegal that Mulford's protected activity was a substantial or motivating reason behind her discharge. Such activity need not be the only reason. Hence it is immaterial that legal cause may have existed also for her discharge, since I find that Mulford's protected activity was a substantial or motivating reason for her discharge.

(f) Mulford did not abandon her job. This is because I find that she did not intend to quit and that at no time did she inform or apprise Respondent that she was relinquishing or surrendering her job.

As found above, I find that Mulford was discharged. This finding in part is derived from the fact, which I find, that Gerlach, Sr., discharged Mulford but used language describing such discharge as "abandoning" the job. Yet at no time did Mulford abandon her employment, and I so find. The facts surrounding such incident are narrated in the next paragraph.

On October 16, 1969, Mulford accompanied employee King to the office to represent King when the latter wanted to know "what was going to happen to King." Mrs. Gerlach, however, instructed King to see Mr. Gerlach alone without Mulford. But King was reluctant to see Mr. Gerlach unless Mulford was also present. This caused Mr. Gerlach to say to King that if King went out the door without seeing him alone she "was finished." But Mulford decided to remain with King. In view of this Mulford asked Mr. Gerlach if he wanted her to go to work. He replied "No. You've abandoned your job. You're finished." On this issue I accept Mulford's version of the incident and do not credit Respondent's evidence insofar as it is contrary to Mulford's testimony. Hence I find that, notwithstanding the language used by Gerlach, Mulford (1) was discharged and (2) did not abandon her job.

3. As to the discharge of Catherine King

King did not testify because of illness. Since her absence is satisfactorily explained, no adverse inference can be drawn from her failure to appear. And I find that the record has been adequately developed to render a finding whether her discharge was lawful. Cf. *American Grinding & Machine Co.*, 150 NLRB 1357, 1358-1359.

I am persuaded, and find, that King was discharged, contrary to the provisions of Section 8(a)(1) of the Act, for engaging in protected activity, and that she did not abandon her job as argued by Respondent. I credit the General Counsel's evidence on this branch of the case and do not credit Respondent's evidence to the extent it is inconsistent therewith. This ultimate finding is based on the entire record in this case and the following subsidiary facts, which I hereby find:

(a) Respondent desired to speak to King concerning King's behavior on the job. While the nature of such talk with King is not clearly disclosed in the record, I find that it at least included King's (1) operating her radio in a loud manner at work, and (2) causing a disturbance among employees. And I find that such talk was not investigative in nature because Mrs. Gerlach personally observed King's alleged derelictions on the job and needed no further inquiry to ascertain the facts. Hence *Texaco, Inc.*, 179 NLRB No. 157, 72 LRRM 1596, is not controlling on this phase of

the case. Further, I find that such talk, regardless of whether actual disciplinary measures are imposed thereat, is so intimately connected with working conditions that, under the contract, King was entitled to be represented by a representative of the Union during the course thereof. (See Article XXIII, Section 1, of the Contract between Respondent and the Union. Charging Party's Exhibit 1.) The Act also conferred such a right upon her.

(b) Since Respondent invited King a few times and at least once ordered her to come to the office, I find that, in going to the office at Respondent's request or command, King did not leave her work station without permission.

(c) Further, I find that King could properly refuse to speak to management without being accompanied by a union representative, and that King's refusing to speak to management in the absence of such representative cannot be characterized as insubordination or other misconduct warranting her discharge. Actually, King was suspended after the first time she refused to speak to management alone, so that thereafter she appeared with a union representative at the office as a suspended employee. Patently she left no work station on those occasions when she called at the office during the suspension period.

(d) On October 16, 1969, King went to the office with union representatives Cochran and Mulford. Soon Cochran left to go to work. At this point Gerlach, Sr., asked to speak to King alone, but King denied this request. Thereupon Gerlach told King that if King "went out the door" she was "finished." Shortly thereafter King went out the door, i.e., left the plant. Since King was still on suspension at the time she could not report to work, and thus was compelled to go out the door when she decided not to speak to Gerlach alone. This constitutes a discharge of King and I so find.

That this constitutes a discharge of, and not an abandonment of her job by, King may be deduced from the fact,

which I find, that Gerlach, Sr., offered King an ultimatum permitting but two unacceptable alternatives. These two choices are: either speak to Gerlach, Sr., without a union representative being present, or leave the office in which case King was "finished."

When an employee is thus confronted with two impossible solutions, one of which he is required to adopt, the fact that she refused to accept one of them does not mean that she acquiesced in the other. Since King was not compelled to forego the presence of her union representative, she could not be said to have voluntarily elected to be "finished" by leaving the plant after it became patent that she could no longer remain there without such representative. It follows, and I find, that by leaving the plant King was involuntarily terminated or discharged, and that, if she was "finished," it was not of her own choosing. Cf. *Roylyn, Inc.*, 178 NLRB No. 33, 72 LRRM 1043. Hence she was "finished" by command of Gerlach, Sr. This constitutes a discharge, and I so find. *Wilder Finishing Co.*, 138 NLRB 1017, 1019-1020.

4. As to threats of reprisals

About October 10, 1969, while employee Delila Mulford was discussing piece rates with Gerlach, Jr., the latter told her that if she "did not like it the way it was there in the company to go elsewhere." This is not a threat to take reprisals against Mulford for engaging in union or other protected activity, and I so find. Later that day Mulford accompanied employee King on a grievance of King's. Both Mrs. Gerlach and Gerlach, Sr., to whom Mulford spoke on this occasion, warned Mulford that Mulford had left her work station without permission and that she was endangering her job remaining there without permission. Neither is this a threat of reprisal as it merely directed Mulford not to leave her work station during work hours unless excused properly therefrom. The fact that both Gerlachs misinterpreted the Act and the collective bargaining contract,

i.e., that union representation lawfully did not need employer permission to prosecute grievances, did not convert this warning into a threat to take reprisals.

On October 15, Gerlach, Sr., told Mulford, in connection with the latter's espousal of King's grievance, to mind her own business, and that Mulford was going to get "into trouble" for not minding her own business. In my opinion the word "trouble" is too ambiguous to connote a threat that Mulford was jeopardizing her job. Hence I find that this utterance by Gerlach, Sr., does not invade any rights safeguarded to employees by the Act.

As found above Gerlach, Sr., refused employee King the right to be accompanied by a union representative when Gerlach desired to speak to King alone. I have found above that either a reprimand or greater discipline could have been imposed upon King at the time. And I have found that King was entitled to be so represented. The complaint alleges that the foregoing conduct constitutes a violation of Section 8(a)(1) and (5) of the Act. Nevertheless I find only that it contravenes Section 8(a)(1) in that it denies an employee the right to engage in a protected activity. But I find it does not transgress Section 8(a)(5), as Respondent in no way is failing or refusing to recognize or bargain with the Union.

About January 12, 1970, employee Alice Hoschar asked Gerlach, Jr., why employee Mary Goodnight's job was taken from her and assigned to Maxine Warner who had less seniority than Goodnight. Insisting that this was a prerogative of management, Gerlach, Jr., advised Goodnight not to come off the floor with a girl during working hours. Later that day Gerlach, Jr., informed Goodnight that he had suspended Mulford for coming off the floor with King.

As found above, it is an implied condition of employment that employees may not leave their work stations during working hours (except for restroom visits, emergencies, and authorized breaks) without permission. Cf. *Emerson*

Electric Co., 185 NLRB No. 71, 75 LRRM 1028. But, as found above, this condition does not apply to union representatives engaged in protected activity. Hence I find that, since Hoschar is the president of the Union's local, she could not lawfully be prevented from leaving her work station on this matter which concerned the Union. But I find no threat of reprisal was uttered when Gerlach, Jr., first talked to her. At most, he told Hoschar not to leave her job without permission. Patently this statement is void of containing anything resembling a threat. And the fact that he much later told Hoschar that he suspended Mulford for coming off the floor with King merely amounts to a reference to a past event and cannot, in my opinion, be considered as part of the earlier conversation with Hoschar. Hence I find no violation of the Act in the second of these two conversations of Gerlach, Jr., with Hoschar.

5. As to the layoffs of October, 1969

Upon the entire record I find that paragraph 13 of the complaint has not been established by a fair preponderance of the evidence. This paragraph accuses Respondent of shutting down its plant and laying off employees in the bargaining unit, from October 29 to November 10, 1969, to discourage (a) union membership or activities, or (b) protected activity, or both. While it is true, and I find, that the plant did shut down and employees were laid off during some of this period, I find that such action was not prompted by discriminatory motives. Rather, I find that said action was necessitated solely by reason of economic or business considerations.

In this connection, I expressly find that said business considerations included an inability to obtain proper cloth for new patterns, so that Respondent was compelled to curtail operations temporarily until such cloth was finally shipped to it. On this issue I credit Respondent's evidence. In particular I am impressed with the testimony of Paul

Marcus, whom I credit, that through no fault of Respondent that piece goods, or cloth, for the new styles did not become available on time, so that layoffs became imperative until such cloth was delivered.

It is true, and I find, that floorlady Helen Rice, told employees Oliver and Hoschar, in laying them off, "I don't know when we'll call you back. Until this mess gets straightened up I just don't know." But the word "mess," especially when used in a context of "running out of work," does not necessarily infer union trouble; it may well allude to the production difficulties incurred when defective cloth had been delivered to Respondent by Mission Valley Mills of Brownsville, Texas. Since the word "mess" is ambiguous, I find that on this record the General Counsel has not shown that it connotes union trouble. Indeed no union trouble existed at the time when Oliver and Hoschar, as well as several other employees, were laid off in late October, 1969.

In attempting to demonstrate that the layoff was unlawful, the Union has emphasized the fact that the finishing operators were recalled to work before the sewing employees. But I accept Respondent's explanation that some finishing work is performed before all sewing operations have been completed. In any event, it has not been established that the finishers were nonunion, so that nonunion employees received preference in being recalled following the layoff. It follows, and I find, that the order of recalling employees, under the circumstances, fails to disclose that the layoff itself was motivated by antiunion considerations. Hence I find distinguishable *Columbia Casuals, Inc.*, 174 NLRB No. 13, upon which the Union relies.

On this issue I have not overlooked Gerlach, Jr.'s, statement to Union Representative Goolst on about November 19, 1969, that Gerlach, Jr., "did not want the work until this union thing gets straightened out." Although I find that such statement was uttered, I nevertheless find that it is

insufficient to establish that the layoff of late October, 1969, was called for antiunion reasons. This is because Gerlach, Jr., was not referring to a layoff which had already occurred, but, rather, was adverting to a hypothetical situation which might transpire, in the future. While this depicts antiunion animus on the part of Gerlach, Jr., it fails to denote that a layoff which took place a couple of weeks before this had been inspired by a desire to hurt the Union.

Also, I find that on about October 20, 1969, Gerlach, Sr., told Union Representative Elizabeth Wiley that he did not desire to discuss the three discharges above described, or "any other damn union problem," or else he would close the plant. Patently this discloses a pronounced antipathy to the Union. But it is inadequate to prove that a layoff which became necessary several days later was prompted by antiunion factors. In this connection, I consider it of some import that Gerlach, Jr., on November 13, 1969, told Mrs. Wiley, a union official, that he would close the plant if Respondent was forced to take back the three dischargees mentioned above. In my opinion this shows that Gerlach, Sr., as well as Gerlach, Jr., were not contemplating a layoff to combat unionism but, instead, considered a layoff only as a last resort to prevent reinstating the three discharged employees.

Finally, it is significant that no top official of Respondent informed a single employee that the layoff was intended to discourage adherence to or interest in the Union. This in itself is not conclusive. But it is inconsistent with an alleged intent to frustrate unionism by a layoff. Intended messages must be identified as such. But an uncommunicated intent to embarrass a union by calling an unnecessary layoff will not accomplish such an end. Manifestly employees can neither read an employer's mind nor fathom his unexpressed ulterior motives; and the employer's failure to disclose the purpose behind a layoff cannot be said to reveal the reason which generated it. Hence it is reasonable to be-

lieve that somehow the employer would have led the employees to know that the layoff was an act of reprisal against the Union if the layoff were directed towards the Union. But in the instant case such evidence is lacking. Failure to make known this purpose detracts from the contention that the aim of the layoff was to hurt the Union.

IV. The Effect of the Unfair Labor Practices Upon Commerce

Those activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

As Respondent has been found to have engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it take specific affirmative action, as set forth below, designed to effectuate the policies of the Act.

In view of the finding that Respondent discriminated against Mulford and Cochran in suspending them, and against Mulford, Cochran, and King in discharging them, it will be recommended that Respondent be ordered to offer to each immediate and full reinstatement to her former position or, if such is not available, one which is substantially equivalent thereto, without prejudice to their seniority and other rights and privileges. It will further be recommended that Mulford, Cochran, and King be made whole for any loss of earnings suffered by reason of the discrimination against them.

In making Mulford, Cochran, and King whole Respondent shall pay to each a sum of money equal to that which each would have earned as wages from the date of her layoff to the date of reinstatement or a proper offer of reinstatement, as the case may be, less her net earnings during such period. Such backpay, if any, is to be computed on a quarterly basis in the manner established by *F. W. Woolworth Company*, 90 NLRB 289, with interest thereon at 6 percent calculated by the formula set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716. It will also be recommended that Respondent preserve and make available to the Board or its agents, upon reasonable request, all pertinent records and data necessary to aid in analyzing and determining whatever backpay may be due. Finally, it will be recommended that Respondent post appropriate notices.

The discriminatory discharges go "to the very heart of the Act." *N.L.R.B.* v. *Entwhistle Manufacturing Company*, 120 F.2d 532, 536 (C.A. 4); *L. E. Johnson Products, Inc.*, 179 NLRB No. 10, p. 1, n. 1. Accordingly, the Board's Order should be broad enough to prevent further infraction of the Act in any manner; and I so recommend. Cf. *R & R Screen Engraving, Inc.*, 151 NLRB 1579, 1587; *A-Z Mfg. & Sales*, 177 NLRB No. 98, p. 1, n. 1.

Upon the basis of the foregoing findings of fact and the entire record in this case, I make the following:

Conclusions of Law

1. The Union is a labor organization within the meaning of Section 2(5) of the Act.

2. Respondent is an employer within the meaning of Section 2(2), and is engaged in commerce as defined in Section 2(6) and (7), of the Act.

3. By discriminating in regard to the tenure of employment of Mulford, Cochran, and King, thereby discouraging membership in the Union, a labor organization, and activities protected by the Act, Respondent has engaged in unfair labor practices condemned by Section 8(a)(3) and (1) of the Act.

4. By refusing an employee the right to be represented by a union representative when Respondent seeks to question such employee concerning his own alleged misconduct in the course of his duties, Respondent has engaged in unfair labor practices prohibited by Section 8(a)(3) and (1) of the Act.

5. The foregoing unfair labor practices affect commerce within the purview of Section 2(6) and (7) of the Act.

6. Respondent has not committed any other unfair labor practices alleged in the complaint.

Upon the foregoing findings of fact, conclusion of law, and the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended

ORDER

Respondent, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in the Union, or any other labor organization, and discouraging activities protected by the Act, by suspending or discharging employees or otherwise discriminating in any manner in respect to their tenure of employment or any term of condition of employment.

(b) Refusing any employee permission to be represented by a labor organization when Respondent seeks to question such employee concerning his own alleged misconduct in the course of his duties.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Catherine King, Delila Mulford, and Martha J. Cochran immediate and full reinstatement each to her former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or other rights and privileges previously enjoyed by them and make each whole for any loss of pay she may have suffered, with interest at the rate of 6 percent, by reason of Respondent's discrimination (including also suspension of Mulford and Cochran) against her, as provided in the section above entitled "The Remedy."

(b) Notify said Catherine King, Delila Mulford, and Martha J. Cochran, if presently serving in the Armed Forces of the United States, each of her right to reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(c) Preserve and, upon reasonable request, make available to the Board or its agents, for examination and copying, all payroll records and reports and all other records necessary to ascertain the amount, if any, of backpay due under the terms of this Recommended Order.

(d) Post at its plant at Point Pleasant, West Virginia, copies of the attached notice marked "Appendix."[2] Copies of said notice, to be furnished by the

[2] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided in Section 102.48 of said Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto

Regional Director for Region 9, after being signed by a duly authorized representative of Respondent, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily displayed. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 9, in writing within 20 days from the receipt of this Decision, what steps Respondent has taken to comply herewith.[3]

It is further recommended that the complaint be dismissed insofar as it alleges unfair labor practices not found herein.

Dated at Washington, D.C.
October 23, 1970

/s/JAMES V. CONSTANTINE
James V. Constantine
Trial Examiner

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shall be deemed waived for all purposes. In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[3] In the event this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES

WE WILL NOT discourage membership in UPPER SOUTH DEPARTMENT, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, or any other labor organization, or discourage activities protected by the National Labor Relations Act, by suspending or discharging employees or otherwise discriminating in any manner in respect to their tenure of employment or any term or condition of employment.

WE WILL NOT refuse any employee permission to be represented by a labor organization at any meeting we hold with the employee for the purpose of questioning such employee about his alleged misconduct in the course of his duties.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed to them by Section 7 of the above Act.

WE WILL offer Catherine King, Delila Mulford, and Martha J. Cochran each immediate and full reinstatement to her former position, or if such position no longer exists, to a substantially equivalent one, without prejudice to their seniority and other rights and privileges enjoyed by each, and make each whole for any loss of pay she may have suffered, with interest at the rate of 6 percent, by reason of her discharge (including also suspension of Mulford and Cochran).

WE WILL notify said Catherine King, Delila Mulford, and Martha J. Cochran, if presently serving in the Armed Forces of the United States, each of her right to reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Serv-

ice Act of 1948, as amended, after discharge from the Armed Forces.

All our employees are free to become, remain, or refuse to become or remain, members of said UPPER SOUTH DEPARTMENT, or any other labor organization.

QUALITY MANUFACTURING COMPANY
(Employer

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, Federal Office Building, Room 2407, 550 Main Street, Cincinnati, Ohio 45202 (Tel. No. 513—684-3686).

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 72-1663

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*
versus

QUALITY MANUFACTURING COMPANY, *Respondent.*

On Application for Enforcement of an Order of the National Labor Relations Board

Argued December 6, 1972. Decided July 19, 1973

Before Boreman, Senior Circuit Judge, Russell and Field, Circuit Judges

Stanley J. Brown, Attorney, National Labor Relations Board, (Peter G. Nash, General Counsel, Patrick Hardin, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel and William F. Wachter, Attorney,

National Labor Relations Board, on brief) for Petitioner; Bernard P. Jeweler (Bernard W. Rubenstein, and Edelman, Levy and Rubenstein on brief) for Intervenor; John E. Jenkins, Jr., (Jenkins, Schaub and Fenstermaker on brief) for Respondent.

BOREMAN, Senior Circuit Judge:

This case is before the court on the application of the National Labor Relations Board for enforcement of its order, issued on January 28, 1972, against the Quality Manufacturing Company (hereinafter "Quality" or "the Company"). The Board's decision and order are reported at 195 N.L.R.B. No. 42.

The Company's owners and principal officers are Lawrence Gerlach, Sr., president; his wife, Mary Kathryn Gerlach, production manager; and their son, Lawrence Gerlach, Jr., general manager. The Upper South Department, International Ladies' Garment Workers' Union, has been certified as the collective bargaining representative of the Company's employees in an appropriate unit since 1968. The Union's chairlady, or steward, who represented the employees in disputes with management under the collective bargaining agreement was, at all times pertinent to this case, Delila Mulford.

On the morning of October 10, 1969, Mulford and three other employees met with all three Gerlachs, during which meeting the employees complained that they could not make a satisfactory wage under the piece work system then in effect. One of those so complaining was Catherine King, a long-time employee. The discussion ended with Gerlach, Jr., ordering Mulford to return to her work station and telling her "if [the employees] didn't like the way it was there in the company to go elsewhere."

Later that same day, Mrs. Gerlach noticed that King had shut down her machine and was waving her arms, gestur-

ing, and causing some minor disturbance. Two other employees had stopped their machines and were watching King. Mrs. Gerlach directed her to resume production, but King told her to "tend to your business," whereupon Mrs. Gerlach ordered King to go to Mr. Gerlach's office. Upon King's request, Mulford left her own work station and accompanied King to the anteroom of Mr. Gerlach's office despite Mrs. Gerlach's warning to Mulford that she "had no business down there." When Mrs. Gerlach informed her husband of what had transpired he told Mulford to return to her work station because "it wasn't a grievance and [they] didn't have any business with her," but Mulford refused. He then ordered King to come into his office for a discussion but King replied that she would not go without Mulford. Mr. Gerlach then told both King and Mulford to return to their work stations, and they did so. On Sunday, October 12, Mr. Gerlach telephoned Mulford and informed her that she was suspended for two days. No reason for the suspension was given but, according to Mulford, she thought it was because of her conduct in seeking to represent King on October 10 in Mr. Gerlach's office.

On Monday, October 13, King found upon reporting for work that her timecard was not in the rack, which indicated under plant practice that she was wanted in Mr. Gerlach's office. This time King asked Martha Cochran, the assistant chairlady to accompany and represent her. Cochran accompanied King without first "punching in" or her own time card. They met Mrs. Gerlach outside the office and she warned Cochran that "your timecard is upstairs and my advice to you is to go on upstairs and go to work if you want your job." Mrs. Gerlach added that they (the Gerlachs) wanted to talk only to King and "take up where we left off Friday." Cochran replied, "Well, Mrs. Gerlach, I'm sorry, but if that's what you want to talk to her about, that is Union business and she has asked me to represent her," stating that she was a union steward and that was her duty.

Cochran and King then spoke to Mr. Gerlach and asked him if he was going to give King her timecard. He said that he would not until she came into his office and talked to him in private. Cochran and King sat and waited in or near the office for the remainder of that day. In the meantime, Cochran's timecard was also "pulled" from the rack.

On Tuesday morning, October 14, Cochran and King again went to Mr. Gerlach's office and asked Mr. Gerlach if he was going to return King's timecard. Gerlach again replied that he would not until King talked to him in private. Cochran asked about her own card and was informed that she had been suspended for two days for being away from her work station the prior day. King and Cochran then left the plant.

The next day, Wednesday, October 15, Mulford's suspension had ended and she returned to Mr. Gerlach's office along with Cochran and King. Mulford inquired as to the status of Cochran and King and was told that Cochran was under suspension and that King was wanted in Mr. Gerlach's office alone. Mulford then returned to work and Cochran and King left the plant.

On Thursday, October 16, Cochran's suspension had expired. She, Mulford and King returned to Mr. Gerlach's office when they were met by Mr. and Mrs. Gerlach. Mrs. Gerlach gave Cochran her timecard and she went to work. Mrs. Gerlach then told King that Mr. Gerlach wanted to see her in the office alone. King asked, "With Delila [Mulford]?" Mr. Gerlach said, "No, not with Delila," and added that if King "went out the door she was finished." King left the plant. Mulford then asked if she should go to work and Mr. Gerlach replied, "You've abandoned your job. You're finished." Mulford left the premises.

That same day, October 16, Cochran went to the office of Gerlach, Jr., during the noon hour and sought to present written grievances on behalf of Mulford, King and herself.

Gerlach, Jr., told her he didn't have time to fool with them since he was leaving town, and refused to accept the grievances. Cochran laid them on his desk but he picked them up and threw them in the trash.

Gerlach, Jr., then walked into the work area, pulled Cochran's timecard, and told her, "You worked this morning, but you're not working this afternoon." Subsequently, Cochran went to the office of Mr. Gerlach and asked if she had been fired. He responded, "Just go home. You wanted to draw unemployment now go on and draw it." Cochran left the plant but telephoned the office later that afternoon and requested that Mr. Gerlach's secretary ask him if she was to report to work the next day. She was told, "He said no." She told the secretary to "tell him that he can reach me at my home phone when he needs me." Cochran was never notified to come back to work.

The full Board held that the Company violated Section 8(a)(3) and (1) of the Act upon a finding that Cochran was discharged because she sought to engage in a protected union activity, i.e., filing grievances on behalf of herself, Mulford, and King. The record contains substantial evidence to support the Board's finding and its order with respect to Cochran's illegal *discharge* will be enforced.

The Board also found (member Kennedy dissenting) that the Company violated Section 8(a)(1) of the Act by discharging King because of her insistence on union representation when summoned to an interview at which she had "reasonable grounds to believe that disciplinary action might result from the Employer's investigation of her conduct," and by suspending and discharging chairlady Mulford and suspending assistant chairlady Cochran because they sought to represent her at such an interview. We hold that on the facts of this case King had no right to have a union representative present at the requested meetings with her employer, and deny enforcement of that portion of the Board's order.

In *N.L.R.B.* v. *Ross Gear & Tool Co.*, 158 F.2d 607 (7 Cir. 1947), a female employee named Ford had engaged in a serious dispute with other employees. When several employees threatened to resign unless Ford was discharged, she was ordered to report to a supervisor's office to discuss the controversy. After Ford twice refused to attend unless accompanied by union representatives, she was discharged for insubordination, i.e., refusal to comply with the order of the supervisor. The Board found that her discharge was because of her insistence on her right to have the union represent her at the meeting and that such discharge was in violation of Section 8(a)(1) and (3) of the Act. The court rejected this determination, commenting (158 F.2d at 613):

> The Board in its brief states: "As the Board has pointed out the legality of Ford's dismissal turns upon the issue whether or not she was within her statutory right in insisting upon the presence of the Union committee when Strecker [the supervisor] ordered her to report to his office alone." A decision of this issue favorable to the Board would mean that any employee could with impunity refuse to comply with a direction by management and in effect abrogate a rule such as the one here involved. Assuming that an employee has a right to be represented by the union in the discussion or representation of a labor grievance with an employer, such a right does not exist in the instant case. This is so, in our view of the matter, because there is no basis for the contention that such a grievance was involved.

In *Dobbs Houses, Inc.*, 145 N.L.R.B. 1565 (1964), an employee was called in for an interview by her employer concerning reported misconduct. Her request that a union representative be present was denied, and at the conclusion of the interview she was discharged. In dismissing the complaint, the Board adopted the Trial Examiner's finding that

the company had not violated Section 8(a)(1) of the Act by refusing to permit the union representative to be present at the employee's termination interview. The Trial Examiner had stated:

> I fail to perceive anything in the Act which obligates an employer to permit the presence of a representative of the bargaining agent in every situation where an employer is compelled to admonish or to otherwise take disciplinary action against an employee, particularly in those situations where the employee's conduct is unrelated to any legitimate union or concerted activity. (145 N.L.R.B. 1571)

Similarly, in *Electric Motors and Specialties, Inc.*, 149 N.L.R.B. 1432 (1964), the Board adopted the Trial Examiner's conclusion that an employee who had been called in for a disciplinary interview (149 N.L.R.B. at 1440)

> . . . had not been called in connection with a pending grievance; her statutory and contract right to representation was inapplicable. The employee's right to representation *when she presents a grievance* is not violated when the employer calls her in for admonition or discipline. (Emphasis in original.)

In *Texaco, Inc., Houston Producing Div.*, 168 N.L.R.B. 361 (1967), an employee was seen carrying a can of kerosene owned by his employer off company property. He was suspended almost immediately. An investigatory interview was scheduled and he requested that a union representative be permitted to attend, which request was denied, but the employee was informed that there would be no interview if he insisted on union representation. The employee chose to proceed, admitted taking the kerosene, and received additional discipline. The trial examiner found no violation of Section 8(a)(5) of the Act since the interview did not involve adjustment of a grievance, no grievance having

yet arisen. The trial examiner found no violation of Section 8(a)(1) of the Act since the employee could have filed a formal grievance and thereby assured himself of union representation. The Board reversed. It found that the employer knew all the facts prior to the interview and that the interview was therefore not investigatory in nature but more concerned with providing a record which would support disciplinary action. It determined that, by such interview, the employer had unlawfully sought to deal directly with the employee on a matter affecting his terms and conditions of employment, and that such conduct "interfered with and restrained [the employee] in the exercise of his rights guaranteed by Section 7 of the Act," and "transgressed [the employer's] statutory obligation to bargain with the Union." The Board held that the employer's conduct violated Section (8)(1) and (5) of the Act. Enforcement of the Board's order was denied. *Texaco Inc., Houston Producing Division* v. *N.L.R.B.*, 408 F.2d 142 (5 Cir. 1969). The court stated (408 F.2d at 144, footnotes omitted):

> After a careful study of the record, we can find neither basis in fact nor in law for the Board's conclusion that a union representative should have been permitted to be present during the interview. The evidence is overwhelming that the interview was investigatory in nature and there is absolutely no evidence that the [employer] sought to deal with [the employee] about the *consequences* of his alleged misconduct. The function of the interview was to question [the employee], not to bargain with him.

In *Texaco, Inc., supra*, the court cited and discussed the Board's decisions in *Chevron Oil Co.*, 168 N.L.R.B. 574 (1967), and *Jacobe-Pearson Ford, Inc.*, 172 N.L.R.B. 594 (1968). Both these cases were decided by the Board subsequent to its decision in *Texaco, Inc., supra*, 168 N.L.R.B. 361 (1967). The court characterized them as proper recog-

nition "that an employee's right to union representation does not apply to all dealings with his employer which may eventually or ultimately affect the terms and conditions of his employment." 408 F.2d at 144. The court continued (408 F.2d at 144-145, footnote omitted):

> In *Chevron Oil Co.*, the Board held that the exclusion of union representation from an employer-employee interview was not unlawful. There, a foreman had reported that nine employees had walked off the job fifteen minutes early in defiance of his orders. The employer interviewed the employees prior to arriving at a decision on whether disciplinary action was warranted. The Board concluded that such a fact-finding meeting was merely an added effort on the employer's part to hear both sides of the story before reaching a decision, and pointed out that employees should not be shielded by a bargaining agent from company inquiries when management embarks upon an investigation to ascertain whether plant discipline has been breached. Likewise, in *Jacobe-Pearson Ford, Inc.*, the Board upheld the denial of requested union representation at a proposed meeting between an employer and his procrastinating employee finding that the meeting was called merely for the purpose of gathering information.
>
> The result reached in these two cases would appear equally appropriate in the case *sub judice*. The Board's reason for finding otherwise is not entirely clear. It attempts to explain away the inconsistency by pointing out that in neither *Chevron* nor *Jacobe-Pearson-Ford* had the employer committed himself to disciplinary action at the time of the interview. But as the Company urges in its brief and as it clearly appears from the record, the Company was not committed to disciplinary action. The foreman's [initial] suspension of [the employee] was conditional pending the outcome of an investigation and by no means *committed* the Company to a course of action. In any event, if an interview is truly investigatory, we see no reason why an employer's prior commitment to disciplinary action should necessarily transform it into a collective bargaining session requiring union representation.

After the court's decision in *Texaco, Inc., supra*, the Board decided at least three other cases involving similar denials of union representation. *Wald Manufacturing Co.*, 176 N.L.R.B. 839, 846 (1969), *aff'd* 426 F.2d 1328 (6th Cir. 1970); *Dayton Typographic Service*, 176 N.L.R.B. 357, 361 (1969); *Texaco, Inc., Los Angeles Sales Terminal*, 179 N.L.R.B. 976, 982 (1969). Complaints which included allegations that such denial of union representation violated the Act were dismissed in all three cases, the latter two involving allegations of Section 8(a)(1) violations. And, very recently, in *Illinois Bell Telephone Company*, 192 N.L.R.B. No. 138 (1971), a phone repairman was suspected of pilfering from a pay phone. He was interrogated, told the money was marked, and made to put the money from his pockets under a fluorescent light. Thereafter, he was interrogated again and his request for union representation was denied. Still later, he was told again the money had been marked and that the interrogator suspected him of having that money. Then the employee's money was again fluoroscoped and he was told that money was marked. The employee was then asked to sign a statement, and the employee again asked for and was denied union representation. Later that day, the employee was suspended. The trial examiner's conclusion adopted by the Board was that at the time of these interrogations no discipline had been decided upon and the interrogation was fact-finding in nature, and that neither Section 8(a)(1) nor (5) of the Act had been violated because "the case law seems clear that the Act exacts no obligation upon the Company to accord the employee the right to union representation at that level of discussion." 192 N.L.R.B. at—.

The Board's holding that Quality violated Section 8(a)(1) of the Act by discharging King and by suspending and discharging Mulford and suspending Cochran cannot be sustained unless it may be said that King had a right to union representation at the interviews with her employer. In determining that such a right existed here for the reason that King had "reasonable grounds to believe that disciplinary action might result from the Employer's investigation of her conduct," the Board departed from existing case law as set out above.[1] The Board took notice of what

[1] Subsequent to its decision in the instant case the Board decided Mobil Oil Corporation, 196 NLRB No. 144 (1972), in which the Board rejected a contention that employees suspected of the theft of their employer's property were not entitled to representation during investigative interviews. The reasoning in *Mobil Oil* was similar to that upon which the decision here was premised. Member Kennedy dissented in *Mobil Oil* as he did in this case. The Board stated (196 NLRB at ——):

> An employee's right to union representation upon request is based on Section 7 of the Act which guarantees the right of employees to act in concert for "mutual aid and protection." The denial of this right has a reasonable tendency to interfere with, restrain, and coerce employees in violation of Section 8(a)(1) of the Act. Thus, it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at *an interview which may put his job security in jeopardy*. Such a dilution of the employee's right to act collectively to protect his job interests is, in our view, unwarranted interference with his right to insist on concerted protection, rather than individual self-protection, against possible adverse employer action. (Emphasis added.)

That case is now pending in the Seventh Circuit, docket Nos. 72-1415 and 1538, upon the Board's application for enforcement.

There is, of course, no doubt that employees have a right to union representation at interviews with the employer after a grievance has been filed. The issue here is whether that right may be extended under the Act to require employers to permit an

it called the "*Texaco* line of cases,"[2] but determined that they were distinguishable since:

> [N]one of those cases presented a situation where an employee or his representative had been disciplined or discharged for requesting, or insisting on, union representation in the course of an interview. In fact, the section 7 right of individual employees to act in concert "for mutual aid and protection" was not directly considered in those cases. Rather those cases involved a determination of whether the right of the union to bargain collectively was such that an employer could not legally deny its request to participate in the interview. (195 NLRB at—.)

It is our conclusion that the Board's attempt to distinguish these prior cases cannot be sustained.

Every situation wherein an employee is directed by management to cooperate in an investigatory interview carries the implicit threat of discipline if such direction is not obeyed. And the statement that a particular Section 7 right mentioned in the above quotation had not been previously considered is inaccurate when examined in the context of the case before us. As illustrated by the cases cited in this opinion, the Board has many times been confronted with an al-

employee to have union representation at interviews hitherto not included within its scope, *i.e.*, whenever the employee has reasonable grounds to believe that disciplinary action might result from the employer's investigation.

[2] *Texaco, Inc., Houston Producing Div., supra*, 168 NLRB 361, enforcement denied, 408 F. 2d 142; Chevron Oil Co., *supra*, 168 NLRB 574; Jacobe-Pearson Ford, Inc., *supra*, 172 NLRB 594; Texaco, Inc., Los Angeles Sales Terminal, *supra*, 179 NLRB 976. In its brief to this court, the Board adds to the list of *Texaco* progeny, Wald Manufacturing Co., *supra*, 176 NLRB 839, *aff'd* 426 F. 2d 1328; Dayton Typographic Service, Inc., *supra*, 176 NLRB 357; Illinois Bell Telephone Co., *supra*, 192 NLRB No. 138; Lafayette Radio Electronics Corp., 194 NLRB No. 77 (1971).

leged violation of Section 8(a)(1) in the context of a denial of union representation at employer-employee interviews. By necessary implication, Section 7 rights have been at issue in each of these cases.[3] Yet never has it been thought, as the Board would hold here, that such rights require an employer to permit an employee to have a union representative present whenever the employee "has reasonable ground to fear that the interview will adversely affect his continued employment, or even his working conditions."

In support of its new theory as to the meaning and application of the Act, and the extent of employees' rights thereunder, the Board offers essentially the following statement: "After reflection, we have concluded that it is a serious violation of an employee's individual right to be represented by his union if he can only request or insist on such representation under penalty of disciplinary action." 195 NLRB at —. The Board cited no supporting legislative history in its opinion nor does it offer any in brief or on argument to this court. It presents no persuasive analysis of the statutory provisions. It only adopted what "seems to us [the Board] to be the proper rule where, as here, the interview, whether or not purely investigative, concerns a subject matter related to disciplinary offenses." 195 NLRB —.

It is clear beyond question, however, that the Board has no power to alter or rearrange employer-employee relations to suit its every whim. Rather, the Board can only determine whether the Act has been violated. And it would appear that in the entire history of the law as developed above,

---

[3] Section 7 of the Act, 29 U.S.C. § 157, gives employees "the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

the management prerogative of conducting an investigatory interview such as Quality attempted here has not been considered a violation of the Act. The language in the concurring opinion of Justices Stewart, Douglas and Harlan in *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 225-26 (1964), is apt:

> "It is possible that . . . Congress may eventually decide to give organized labor or government a far heavier hand in controlling what until now have been considered the prerogatives of private business management. That path would mark a sharp departure from the traditional principles of a free enterprise economy. Whether we should follow it is, within constitutional limitations, for Congress to choose. But it is a path which Congress certainly did not choose when it enacted the Taft-Hartley Act.

For the above-stated reasons, enforcement of the Board's order insofar as it pertains to the discharge of King and Mulford and the suspensions of Mulford and Cochran is denied.

Enforcement granted in part and denied in part.

Filed July 19, 1973

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1663

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

vs.

QUALITY MANUFACTURING COMPANY, *Respondent*.

On Application for Enforcement of an Order of the National Labor Relations Board

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for enforcement of an order issued by it against Respondent, Quality Manufacturing Company, its officers, agents, successors, and assigns, on the 28th day of January, 1972, in proceedings before the said Board known upon its records as Case No. 9-CA-5576; upon the certified list in lieu of a transcript of the record; and the said cause was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fourth Circuit, that the said order of the National Labor Relations Board be, and it is hereby, enforced with respect to Cochran's illegal discharge, and denied insofar as it pertains to the discharge of King and Mulford and the suspensions of Mulford and Cochran, in accordance with the opinion of this Court filed herewith.

WILLIAM K. SLATE, II
Clerk

(Seal)

A True Copy, Teste:

WILLIAM K. SLATE, II, Clerk
By VIRGINIA LIPFORD
Deputy Clerk

Supreme Court, U. S.
FILED
JUN 5 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-765

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, UPPER SOUTH DEPARTMENT, AFL-CIO, *Petitioner*

v.

QUALITY MANUFACTURING COMPANY and NATIONAL LABOR RELATIONS BOARD

On Writ of Certorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR CERTIORARI FILED NOVEMBER 12, 1973
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

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INTERNATIONAL LADIES' GARMENT WORKERS' UNION, UPPER SOUTH DEPARTMENT, AFL-CIO, *Petitioner*

v.

QUALITY MANUFACTURING COMPANY and NATIONAL LABOR RELATIONS BOARD

On Writ of Certorari to the United States Court of Appeals for the Fourth Circuit

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APPENDIX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case No. 9-CA-5576

In the Matter of

QUALITY MANUFACTURING COMPANY

and

UPPER SOUTH DEPARTMENT, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO

Cassius B. Gravitt, Jr., Esq. for General Counsel, NLRB.

Bernard W. Rubenstein, Esq., Baltimore, Md., for the Charging Party.

John E. Jenkins, Esq., Huntington, W. Va., for the Respondent.

Chronological List of Relevant Docket Entries

3.19.70 Charge filed.

5.25.70 Complaint & notice of hearing, dated.

6.4.70 Respondent's answer, received.

7.10.70 Order postponing hearing dated.

8.5.70 Hearing opened.

8.6.70 Hearing closed.

10.23.70 Trial Examiner's Decision, issued.

11.17.70 Respondent's exceptions, received.

1.28.72 Decision and Order issued by the National Labor Relations Board, dated

7.19.73 Decision of the Court of Appeals for the Fourth Circuit, dated.

7.19.73 Judgment entered by the Court of Appeals for the Fourth Circuit, dated.

4.29.74 Order of the Supreme Court granting certiorari, dated.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

Case No. 9-CA-5576

[Caption Omitted]

Complaint and Notice of Hearing

It having been charged by Upper South Department, International Ladies' Garment Workers' Union, AFL-CIO, herein called the Charging Party, that Quality Manufacturing Company, herein called Respondent, has engaged in and is engaging in unfair labor pretices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director for Region 9, pursuant to Section 10(b) or the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1. The charge was filed by the Charging Party on March 19, 1970, and was served on Respondent by registered mail on March 20, 1970.

2. (a) Respondent is a West Virginia corporation engaged in the manufacture of women's clothing at its plant located at Point Pleasant, West Virginia.

(b) During the past 12 months, which is a representative period, Respondent had a direct outflow of products in interstate commerce, valued in excess of $50,000, which it sold and shipped directly from its Point Pleasant, West Virginia plant to customers located outside the State of West Virginia.

(c) At all times material herein, Respondent is and has been an "employer" as defined in Section 2(2) of the

Act, engaged in "commerce" and in operations "affecting commerce" as defined in Section 2(6) and (7) of the Act, respectively.

3. At all times material herein, the Charging Party is and had been a labor organization as defined in Section 2(5) of the Act.

4. At all times material herein, the following-named persons were employed by Respondent and occupied the positions set opposite their respective names and are, and have been, agents of Respondent, acting on its behalf, and supervisors as defined in Section 2(11) of the Act:

Lawrence R. Gerlach, Sr., President
Mary Kathryn Gerlack, Production Manager
Lawrence R. Gerlach, Jr., General Manager
Helen Rice, Floor Lady

5. All production and maintenance employees of Respondent at its Point Pleasant, West Virginia plant, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a union appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

6. On or about October 24, 1968, a majority of the employees of Respondent in the unit described in paragraph 5, above, by a secret ballot election conducted under the supervision of the undersigned Regional Director of Region 9 of the Board, designated and selected the Charging Party as their representative for the purposes of collective bargaining with Respondent, and on or about November 1, 1968, the undersigned Regional Director on behalf of the Board, certified the Charging Party as the exclusive bargaining representative of the employees in said unit.

7. At all times since November 1, 1968, the Charging Party has been, and is now, the exclusive representative

for the purposes of collective bargaining of the employees in the unit described in paragraph 5, above, and has negotiated an existing collective-bargaining agreement with Respondent covering rates of pay, wages, hours of employment, and other terms and conditions of employment of the employees in the said unit.

8. On or about the dates indicated above, Respondent, at its Point Pleasant, West Virginia plant, unless otherwise indicated, interfered with, restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, by:

(a) The conduct of Lawrence Gerlach, Sr, on or about October 10, 1969, and at all times thereafter, in refusing to allow an employee to be represented by the Charging Party at a meeting which had been called by Respondent for the purpose of reprimanding and disciplining the employee.

(b) The conduct of Mary Kathryn Gerlach on or about October 10, 1969, in threatening to take reprisals against an employeet because of her activities on behalf of the Charging Party.

(c) The conduct of Lawrence R. Gerlach, Jr., on or about January 12, 1970, in threatening to take reprisals against an employees because of her activties on behalf of the Charging Party.

9. On or about October 16, 1969, Respondent discharged employee Catherine King and has at all times since failed and refused to reinstate her to her former position because of her engaging in concerted activities for mutual aid and protection and/or collective bargaining, and/or in order to discourage membership in and activities on behalf of the Charging Party.

10. On or about October 12, 1969, Respondent suspended employee Delilah Mulford from work for two (2) days in

order to discourage membership in and/or activities on behalf of the Charging Party, and/or because of her engaging in concerted activities for mutual aid and protection and/or collective bargaining.

11. On or about October 14, 1969, Respondent suspended employee Martha J. Cochran from work for two (2) days because of her activities on behalf of the Charging Party, and/or to discourage employee membership in or activities on behalf of the Charging Party and/or concerted activities for mutual aid or protection or collective bargaining.

12. On or about October 16, 1969, Respondent discharged said Delilah Mulford and Martha J. Cochran in order to discourage membership in and/or activities on behalf of the Charging Party, and/or because of their engaging in concerted activities for their mutual aid and protection and/or for purposes of collective bargaining.

13. On or about October 29 and until on or about November 10, 1969, Respondent did shut down its plant and laid off all employees employed in the said unit represented by the Charging Party in order to discourage employee membership in and/or activities on behalf of the Charging Party and/or in order to discourage employees from engaging in concerted activity for their mutual aid or protection or collective bargaining.

14. By the conduct alleged in paragraph 8(a) above, Respondent did refuse to recognize and/or bargain collectively with the Charging Party in good faith as the exclusive collective-bargaining representative of the employees in the unit described in paragraph 5 above.

15. By the acts and conduct alleged above, Respondent has engaged in, and is engaging in, unfair labor practices as defined in Section 8 (a)(1), (3) and (5) of the Act, affecting "commerce" as defined in Section 2(6) and (7) of the Act, respectively.

PLEASE TAKE NOTICE that on the 14th day of July, 1970, at 10 o'clock in the forenoon (EDST) in the Circuit Court Room, Mason County Court House, Point Pleasant, West Virginia, a hearing will be conducted before a duly-designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, Respondent shall file with the undersigned Regional Director, acting in this matter as an agent of the Board, an original and four (4) copies of an Answer to said Complaint within ten (10) days from the service thereof, and that unless it does so, all of the allegations of the Complaint shall be deemed to be admitted to be true and shall be so found by the Board.

Form NLRB-4668, Statement of Standard Procedure in Formal Hearings held before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

Dated at Cincinnati, Ohio this 25th day of May, 1970.

/s/ JOHN C. GETREU
Regional Director
Region 9,
National Labor Relations
Board
2407 Federal Office Building
550 Main Street
Cincinnati, Ohio 45202

• • • • • • • • • • •

[Caption omitted]

Answer

Quality Manufacturing Company, Respondent herein, answers the Complaint as follows:

1. The Respondent admits the allegations of Sections 1 through 7, inclusive.

2. The Respondent denies the allegations contained in Section 8 through 15, inclusive.

/s/ J. E. JENKINS
Of Counsel for Respondent

JENKINS, SCHAUB N FENSTERMAKER
500 Kelly-Hatfield Building
704 Fourth Avenue
Huntington, West Virginia
Attorneys for Quality
Manufacturing Company

• • • • • • • • • •

[Caption omitted]

[Received November 17, 1970]

Exceptions of Respondent to Trial Examiner's Decision

1. The examiner erred in finding Cochran was suspended for two days beginning October 14, 1969, for pro-union activity. TXD, p. 13, lines 12-17. The entire undisputed record shows the existence of Respondent's rule against leaving work station without permission. Examiner assumes that the attempted discussion between King and Gerlach Sr. might result in a reprimand or sterner discipline. TXD, p. 13, lines 31-34. Examiner erred in refusing to permit Gerlach Sr. to testify on this subject and in refusing Respondent to make and show as an avowal of the record what said testimony would be. Tr. pp. 467-469. There is no evidence in the record to support finding that

the contract rendered ineffective said rule. TXD, p. 13, line 38 to page 14, line 9. Examiner further erred in finding meeting between King and Respondent could result in reprimand or severer discipline and erred in finding meeting did not seek information. TXD, p. 14, lines 11-24. Examiner has misinterpreted and failed to apply doctrine of *Texaco Co. Jacobs, Pearson Ford, Inc.*, and *Chevron Oil Co.* coted in TXD, p. 14, lines 19-24.

Examiner improperly found anti union animus. TXD, P. 14, lines 26-34, on allegations not material to issue. Employer's attitude cannot be used to resolve every factual situation adversly to Respondent.

Examiner improperly allows employees active for union to disregard plant rules. TXD p. 14, lines 36-40.

Examiner erred in finding Cochran's union activity was a reason for her suspension. TXD p. 15, lines 7-15. The record shows the only reason for her suspension was her violation of a well established rule uniformly applied to all employees to which union has never objected.

Examiner misconstrues *Socony Mobile Oil Co.* and fails to apply Emerson Electric C1. TXD, p. 15, lines 17-30.

Examiner found Cochran was discharged on October 16, 1969, when entire evidence in record is to contrary. TXD p. 15, lines 31 to page 16 line 32.

Examiner improperly concludes Cochran suspension violated Sec. 8(a)(1) and (3) of the Act because no evidence supports this conclusion and the evidence shows she was suspended for one afternoon only and thereafter failed to return to work by her own choice.

2. Examiner erred in finding Delila Mulford was suspended in violation of the Act. TXD p. 16, lines 43-50. There is no evidence in the record other that than her violation of Company rule of leaving work without per-

mission resulted in her suspension. None of the evidence cited by the examiner supports his conclusion. TXD p. 17, lines 4-38. Examiner incredibly finds Respondent had no express rule against leaving work station without permission. All witnesses recognized the existence of this rule. TXD p. 17, line 38 to page 18, line 12. Examiner erred in finding Mulford was discharged when evidence is entirely to contrary. TXD, p. 18, lines 14-35.

3. Examiner erred in finding King was discharged for protected activity. The examiner finds incorrectly that Mr. Gerlach Sr., could not have an investigatory discussion with King because examiner finds that Mrs. Gerlach was a witness. This is a complete fallacy adopted by the examiner to avoid the rule of *Texaco, Inc.* TXD, p. 18, line 41 to page 19, line 14. Examiner's finding that King could refuse to speak to management without union representation is contrary to all cited authorities in TXD. TXD, p. 19, lines 21-28. The examiner finds King was discharged when she left plant on her own decision. TXD p. 19, line 30 to page 21, line 9.

4. Consistent with the foregoing, the Respondent excepts to examiner's conclusions of law nos. 3, 4, and 5. TXD p. 24, lines 9-20.

/s/ JOHN JENKINS
Of Counsel for Respondent

JENKINS, SCHAUB AND FENSTERMAKER
Attorneys for Quality Manufacturing Company
Post Office Box 1457
Huntington, West Virginia 25716

• • • • • • • • • • •

[CERTIFICATE]

Excerpts from Transcript of Proceedings

[1] BEFORE THE NATIONAL LABOR RELATIONS BOARD

Ninth Region

Case No. 9-CA-5576

Circuit Courtroom
Second Floor
County Courthouse
Point Pleasant, West Virginia
Wednesday, August 5, 1970

• • • • • • • • • • •

[5] PROCEEDINGS

Trial Examiner Constantine: The hearing will be in order.

This is a formal hearing in the matter of Quality Manufacturing Company, Case Number 9-CA-5576, before the National Labor Relations Board.

The Trial Examiner designated to hear this case is James V. Constantine.

There will be no opening statements, gentlemen, in view of the fact that we knoww about all of these cases. We are experienced counsel. And also under the Board's revised practice a statement of procedures are now mailed to the parties will enter their appearances for the record.

At this time counsel and other representatives for the parties.

For the General Counsel?

Mr. Gravitt: Cassius B. Gravitt, Jr., Region Nine, 550 Main Street, Cincinnati, Ohio.

Mr. Rubenstein: For the Charging Party, Bernard W. Rubenstein, 10 Light Street, Baltimore, Maryland 21202.

Trial Examiner: Would you please identify the Charging Party? I know who it is.

Mr. Rubenstein: The Charging Party is the International Ladies' Garment Workers' Union, Upper South Department.

Trial Examiner: Now go ahead, Mr. Jenkins.

Mr. Jenkins: May the record show John E. Jenkins, [6] Post Office Box 1457, Huntington, West Virginia, 45796.

Trial Examiner: Go ahead, Mr. Gravitt, in this proceeding.

Mr. Gravitt: Your Honor, I offer into evidence the formal papers. They have been marked as General Counsel's Exhibits 1(a) through 1(h); 1(h) being the index and description of the formal documents.

They have already been shown to parties.

Trial Examiner: I assume there is no objection.

Mr. Rubenstein: No.

Trial Examiner: These papers have been served on the parties.

Mr. Jenkins: The Respondent has no objection.

Trial Examiner: All right. Thank you. I will admit them into evidence in the absence of objection.

Mark them received, Mr. Reporter.

(The above-referred to documents were marked General Counsel's Exhibits Nos. 1(a) thru 1(h) for identification and were received.)

• • • • • • • • • •

[7] **Joel Goolst**

was called as a witness by and on behalf of the General Counsel and, after being first duly sworn, was examined and testified as follows:

• • • • • • • • • •

DIRECT EXAMINATION

Q. (By Mr. Gravitt) Would you state your address, please? A. 10927 Battersey Lane, Columbia, Maryland.

Q. And you are associated with the union in this case? A. Yes. sir.

Q. In what capacity, sir? A. I am the union's organizing director in this region.

Q. Are you familiar with the plant of the Respondent here in Point Pleasant? A. Yes, sir.

Q. That come under your jurisdiction and supervision? A. As the organizing director it came under my—

Q. I see. A. —jurisdiction.

• • • • • • • • • •

[9] Q. (By Mr. Gravitt) And then did you later negotiate a contract? A. Yes, sir.

Q. And were you on the negotiating committee? A. Not officially.

Q. Do you recall Martha Cochran, if she was on the committee? A. Yes, sir.

• • • • • • • • • •

[13] Q. (By Mr. Gravitt) Now, on December the 3rd, just tell us about the conversation, about the discharges, sir, layoff, or any discussion you had.

• • • • • • • • • •

Trial Examiner: The record will show December 3rd.

Mr. Jenkins: Very good.

Mr. Gravitt: Go ahead and tell us about it.

The Witness: The conversation took place in Mr. Gerlach, Jr., office in the plant about ten a.m. in the morning. And the conversation was based on the three discharged employees.

• • • • • • • • • •

[14] The Witness: The union's position, which I presented at the time, Mrs. Wiley was with me at the time,

she is a business agent with the union, was that we would like to have the employees reinstated.

Q. (By Mr. Gravitt) What did he say? A. He said "No." We discussed it further and he said that it would be hard for the family to live with these people back in the factory.

Q. Did he tell you why? A. He said that they were abusive and that he had a number of problems with Catherine King, for one, who for twenty-five years had talked directly to the family and had been a friend of the family and he had gone to school with, all of a sudden decided that she needed somebody else in the office when she presented her grievance.

Did he say who this somebody else was during the conversation? A. I really don't remember.

Q. Was the union mentioned? A. The union was mentioned by me and also by him?

Q. What was said about the union? A. Well, he gave [15] me his position on how he felt about the union.

Q. Just tell us what he said. A. For all the time. He told me that he didn't want a union, that he never wanted a union, that he hoped we would come into town with another factory and open up another factory and take the union people there and he could run his business without a union. This has been his position all along.

Q. And did he tell you that on December 3rd? A. Oh, yes.

• • • • • • • • • •

Q. (By Mr. Gravitt) Now, did he mention grievances? A. He mentioned grievances and he mentioned grievances in the context of the contract. And he said he doesn't understand why it has to be any written grievances and why people couldn't come and talk to him as they have done in the past before the union came around.

• • • • • • • • • •

[16] Q. (By Mr. Gravitt) Did he make this statement to you more than one time during this meeting? A. Yes.

• • • • • • • • • •

Mr. Gravitt: How many times?

• • • • • • • • • •

The Witness: Four, five, six times. The conversation just went round and around and around and came back.

• • • • • • • • • •

[17] Q. (By Mr. Gravitt) Now, do you recall anything else he said that you haven't told us? A. Well, we talked about the possibility of a case. And he said that he was not interested in the case and if we did go into a court of any kind that he felt that he had enough proof that the three people would not win the case.

And I must, I don't know. He then brought down the proof. He brought down one of the workers from the bargaining unit.

[18] Q. Now, do you recall him telling you why he discharged King, Mulford and Cochran on this occasion?

• • • • • • • • • •

[19] The Witness: Oh, yes, sir. Yes.

• • • • • • • • • •

Q. (By Mr. Gravitt) What did he say? A. He said that he let King go, he was glad that he let King go because she would not come into the office alone. He never heard of any nonsense like that. And he let the other one go because she came off the floor. I don't remember whether it was Cochran or Mulford—

Q. Yes. A. —that he was talking about.

Q. Yes. Go ahead. A. Because she came off the floor and he said, "You know you can't come off the floor." And I said, "Well, I don't know, but if there was a grievance and she was the chairlady—Is she the chairlandy?" And he said, "Yes." And I said, "Well, she was called for," And he let them go for that reason.

And he let the other one go because she went in with King also. After he let the first one go he would not talk to King or any of the two chairladies in the shop.

Q. Now, these two people you referred to, other than King, do they hold any position with your union? A. They were chairladies.

Q. Chairladies? A. Right.

[20] Q. And does a chairlady's position relate to grievances in any way? A. Oh, yes, sir.

Q. And in what way, sir? A. The chairlady is the person who receives the grievance from the grieved employee and then takes it up with management.

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Q. (By Mr. Gravitt) Now, did he tell you what this grievance was that King had? A. No.

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[21] Q. (By Mr. Gravitt) What did he want to talk to King about? A. He didn't say what he wanted to talk to King about. At, you know, at this time I never got into what the grievances were between the employees and—

Q. It was a grievance? A. I knew there was a grievance. I never got into what the grievance was. I was really there to see whether or not we can arrange to have the people come back to work at the plant.

Q. Do you know which girl had the grievance? A. I was under the impression that it was King.

Q. Catherine King? A. Yes.

Q. Now, this was Gerlach, Jr. you were talking with? A. Yes, sir.

Q. Did you ever talk with Gerlach, Sr.? A. Yes, sir.

Q. Now, were you in the office of the Respondent on or about November 19, 1969? A. Yes, sir.

Q. And who did you talk with on this occasion? A. Gerlach, Jr.

Q. All right. Did you talk about the discharges at this [22] time? A. Yes, sir.

Q. All right. What did he tell you about the discharges?

Trial Examiner: Well, to make it short, did he tell you anything this time that was different from the time that you just talked about?

The Witness: No, sir.

Trial Examiner: All right. I will assume he is readopting his former testimony. There is no use in going into it.

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[25] Q. (By Mr. Gravitt) Now, on January 12th of this year did you have a discussion with Respondent?

Trial Examiner: Who is Respondent? There is a corporate—

Mr. Gravitt: Mr. Gerlach.

Trial Examiner: The owner? It's all one setup. There's more than one Gerlach. It's a Mrs., a Senior and a Junior. All three of them?

[26] Mr. Gravitt: Yes.

Trial Examiner: Was that January?

Mr. Gravitt: January 12, 1970.

The Witness: Yes, sir.

Q. (By Mr. Gravitt) And who did you talk with on this occasion? A. Junior Gerlach.

Q. Junior Gerlach? A. Yes.

Q. And where did the conversation take place? A. In his office.

Q. And who was present, if you can recall? A. Just myself.

Q. All right. You and Mr. Gerlach? A. Yes.

Q. And did you mention the three discharges on this occasion? A. Yes, sir.

Q. All right. And what did he say about them?

Trial Examiner: You have already give a conversation on December 3rd at which you mentioned the three discharges. Did he say or did you say anything different now on January 3rd than on December?

The Witness: Yes, sir.

Trial Examiner: There was a different conversation?

[27] The Witness: Yes sir.

Trial Examiner: All right.

The Witness: The company's position changed somewhat to not taking them back, at it was, as their position was previous, to there would be a possibility of taking them back if we could work something out and—

Mr. Jenkins: I object to his characterizing this testimony. In other words I want to know what was said. That is the primary evidence. And I object to these conclusionary statements of the witness and characterization.

Trial Examiner: I am going to sustain that on another ground. That is if there were attempts to compromise I am not going to hold that conversation admissible. The usual rule is if they want to compromise conversations that affects the settlement—

Mr. Gravitt: That's going the other way on it. I haven't got it clear in the record. That is a wrong inferencer on it, Your Honor. I'm sorry.

Trial Examiner: You are not going to get him to change his testimony, are you?

Mr. Gravitt: No.

Trial Examiner: He said that they were willing—

Mr. Gravitt: To work something out. That's what we haven't got in.

[28] Q. (By Mr. Gravitt) Now, did he tell you about this working something out, what it related to? A. Well, he said that they need operators, they could use good operators and these people, two of the three of them were good operators and that they would be interested in possibly taking them back if we would not press for any back money because his daddy wouldn't—

Q. What did he say about grievances? A. —pay one red cent. And that we would have to drop any of either charges or grievances that the people had against the company.

Q. Did he mention to you in any way about grievances in production? A. Well, I had said something about the fact that there had been no grievances since the time of the discharge of these three people and that if his attempt was to throw fear into the rest of the people they succeeded in doing this.

Q. What did he say? A. He said there are no grievances because the three trouble makers are out of the factory and there's no reason for any grievances. Everybody's very happy.

Q. Now, January 21st did you have another conversation with a member of Respondent's family, 1970? A. Yes, sir.

Q. And who did you talk with on this occasion? [29] A. It was Gerlach, Sr.

Q. Now, where did you talk to him? A. In his office.

Q. And who was present? A. The business agent from the union.

Q. Mrs. Wiley? A. Right.

Q. Mrs. Elizabeth Wiley? A. Yes, sir.

Q. I see. Now, what did Mr. Gerlach say to you on this occasion about the discharges? A. Mr. Gerlach, Sr. said—

Mr. Jenkins: Just one second. I again object to the use of this word "discharge." Because it has never been established.

Trial Examiner: You admit it in your answer. You admit that they were discharged, but you claim they were lawfully discharged.

Mr. Jenkins: No, we don't, Your Honor.

Trial Examiner: That's the way I read your naswer.

Mr. Gravitt: Well, the fact is that they are not there working any more and he won't let them come back.

Mr. Jenkins: Well, that is what is in dispute here. And there is no evidence in the record here on this.

Trial Examiner: In other words you contend that they [30] were not discharged?

Mr. Jenkins: Of course. That's right.

Mr. Jenkins: And I object to this constant repetition of this conclusion as a preface to these questions.

Q. (By. Mr. Gravitt) Did he tell you why these three girls weren't working on this occasion?

Trial Examiner: I'll admit that question.

The Witness: Yes.

Q. (By Mr. Gravitt) What did he say? A. He said that their conduct in the plant and their conduct to him was such that he couldn't have them back.

Q. Did he specify to you what conduct he was talking about? A. No. He did say something about the fact that since the union has been in here or been around that the people are losing respect for management and that's a very important thing.

Trial Examiner: Well, he didn't say that that was the reason why he didn't take them back, did he? The question is what language did he use in refusing to take them back.

The Witness: He said they no longer have respect.

Trial Examiner: All right.

The Witness: That's what he said.

[31] Trial Examiner: These three girls no longer have respect?

The Witness: Right.

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[32] CROSS EXAMINATION

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[36] Q. (By Mr. Jenkins) Mr. Goolst, you mentioned that Martha Cochran was on the negotiating committee. Was Mrs. King or Mrs. Mulford on the committee? A. Mrs. King attended negotiating meetings at the request of Mr. Gerlach.

Q. She was not on the committee? A. Officially no, sir. Mrs. Mulford I don't remember. I don't recall.

Q. And you say that Mr. Gerlach made a special request that Mrs. King attend the negotiating sessions and that this request apparently was acceeded to and she did, in fact,

attend union negotiating meetings? A. I would say the Union had no choice.

Q. I didn't ask you for your conclusion as to whether the union has a right to determine its own negotiating committee or not.

[37] Trial Examiner: Did the union consent to Mr. Gerlach's request?

The Witness: That Mrs. King be at the meetings?

Trial Examiner: Yes.

The Witness: Yes; but not as a representative of the union.

Trial Examiner: All right.

Q. (By Mr. Jenkins) Then Mrs. King then was there as a representative of the company during the negotiating meetings, right? A. Sir, I don't want to argue with you.

Trial Examiner: Just answer the question.

The Witness: Number one, I was not there. Since I was not there I would have no idea of why she was there. She was not there as a representative of the union.

Q. (By Mr. Jenkins) Well, you have undertaken to state who was a member, Mrs. Cochran, on your direct examination in response to General Counsel's question on was she a member of the committee. And now if you weren't there how do you know she was a member of the committee? A. Well, I know she was a member of the committee because I was there when she was elected to the negotiating committee. And I sent her to negotiate the contract with the other members.

Q. How do you know she served if you weren't there?

[38] A. I sent her to negotiate.

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Q. (By Mr. Jenkins) Now, you say that Mrs. King was there at the request of the company, is that correct? A. Yes, sir.

Q. Now, in October of 1969 who were the chairladies at the plant?

Trial Examiner: Does it matter?

Mr. Jenkins: I think its very critical, Your Honor.

The Witness: I couldn't answer you, sir.

Q. (By Mr. Jenkins) Pardon? A. I couldn't answer you. I was not here at the time.

[39] Q. Right. So you don't know? A. No, sir.

Q. And if you gave an answer on direct examination that any of these alleged discriminatees were chairladies of the plant then you were not testifying of your own knowledge, were you? A. No, sir.

Q. Fine. In other words you were representing something to the Trial Examiner that you did not know factually was correct?

Mr. Gravitt: I object. Has misstated the evidence. He asked about November. And his testimony was about October.

Mr. Jenkins: I asked about October.

Mr. Gravitt: The capacity of these people—

Trial Examiner: He knows what went on in his mind. He can answer that question.

What is the answer?

The Witness: I'd like to hear the question.

Trial Examiner: Repeat the question.

Mr. Jenkins: All right. Do you want the reporter to?

Trial Examiner: No. It would be easier for you to repeat it than the reporter.

Mr. Jenkins: Sure.

Q (By Mr. Jenkins) As I understand your testimony [40] then you did not know in October of 1969 who were the chairladies at the plant? A. No, sir.

Q. Isn't it a fact that at your conversation on January the 2st, 1970, with Mr. Gerlach, Sr., that Mr. Gerlach, Sr. advised you at that time that there three women could come back to work at any time they wanted to, but they would have to obey the same rules and regulations as anyone else in the plant? A. No, sir.

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[41] **Martha Jane Cochran**

was called as a witness by and on behalf of the General Counsel and, after being first duly sworn, was examined and testified as follows:

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[42] DIRECT EXAMINATION

Q. (By Mr. Gravitt) What were your duties with the company before you were discharged? A. My duties as a machine operator?

Q. Yes. A. I—

Mr. Jenkins: Once again, Your Honor, this constant suggestive question is objectionable to me as leading.

Trial Examiner: Ths issue of discharge is in issue?

Mr. Gravitt: Yes.

Trial Examiner: You are a machine operator?

The Witness: Yes.

Trial Examiner: All right. Then there you are.

Q. (By Mr. Gravitt) And who was your floor lady? A. My floor lady was Helen Rice.

Q. Do you know Catherine King? A. Yes, sir; I do.

Q. Who is she? A. She was also a machine operator.

Q. Do you know where she is now? A. Yes, I do. She has been very ill in the hospital. She was released last week.

[43] Q. Did she have an operation? A. Yes, she did.

Q. Do you know what kind of an operation? A. A very serious operation.

Q. What was—Was it a brain operation? A. Yes, sir.

Q. Brain surgery? A. That's right.

Q. And approximately when did she have the operation? A. She had the operation, I think it was around, it's been about two weeks ago when she had the surgery.

Trial Examiner: Is this to explain the absence of King from the hearing?

Mr. Gravitt: Yes, Your Honor. She had a serious brain operation.

Trial Examiner: I am sure Mr. Jenkins will be glad to stipulate to that if you talk to him off the record.

Mr. Gravitt: Yes. I so stipulate that she is unable to attend the hearing due to a serious brain operation.

Trial Examiner: I hate to take up time.

Mr. Gravitt: Do you stipulate?

Mr. Jenkins: I have no—

Trial Examiner: Wait. Take it up with him during the next recess.

Mr. Jenkins: If Mr. Gravitt represents this is of his [44] own knowledge then I will so stipulate.

Trial Examiner: Well—

Mr. Jenkins: I have no way of knowing.

Mr. Gravitt: Yes, it is.

Trial Examiner: Do you accept his word or not?

Mr. Jenkins: Certainly.

Trial Examiner: Let's not go into it any further.

Mr. Gravitt: The stipulation will be received?

Trial Examiner: Yes.

Q. (By Mr. Gravitt) Now, do you hold any particular office in the local union? A. Yes, sir, I do.

Q. What? A. Well, I am the secretary-treasurer for the union and also a shop, assistant shop chairlady in the plant.

Q. You are assistant shop chairlady? A. Yes. That is—I'll explain that if you like.

Q. Yes. What is it? A. This is in case the chairlady is absent from work. Then I am to take up the grievance.

Q. With whom? A. With the company.

Q. I see. A. When there is a grievance to be filed. [45] And I am to file them.

Q. Who was the chairlady before you? A. Delila Mulford.

Q. That is the one that is no longer working at the plant? A. Yes. That's right.

Q. I see. And then when she left you took over? A. Yes, sir.

Q. I see. Did you attend a meeting on October 10th with the Gerlach's over grievances? A. October 10th? No, sir, I didn't.

Q. You didn't attend that? A. No, sir.

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Q. (By Mr. Gravitt) Well, now directing your attention to October 13th, 1969, did you have any discussion with King? A. Yes, sir, I did.

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[46] Q. (By Mr. Gravitt) Did she mention to you about a grievance? A. Yes.

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[47] Q. (By Mr. Gravitt) Now, what action did you take after this conversation with King, if any? A. Action that I took was that she asked me to represent her that morning.

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Q. (By Mr. Gravitt) What did she ask you to [illegible]? A. She asked me to represent her that morning because she felt that—

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[48] Q. (By Mr. Gravitt) Now, did you do anything about it? A. Yes.

Q. What did you do? A. I stayed down to the office with her.

Q. Whose office? A. Mr. Gerlach's office. Actually we stayed in the cafeteria just outside the office.

Q. All right. Did you ever see Mr. Gerlach? A. Yes, sir, we did.

Q. Did you have any discussion with him? A. Yes, sir.

Q. Which one was it? A. Well, first we talked to Mrs. Gerlach.

Q. You talked to Mrs. Gerlach? A. Yes, sir.

Q. All right. Now, what did you say to her and what did she say to you? A. Well, the first came to me and she

said, "Now Martha," she said, "your time card is upstairs and my advise to you is to go on upstairs and go to work if you want your job."

[49] Q. And who told you this? A. Mrs. Gerlach.

Q. All right. A. She said, "All we want to do is talk to Catherine." And I asked her, I said, "Well, what do you want to talk to Catherine about?" She said, "Well, we want to take up where we left off Friday."

Q. Where they left off Friday? A. Yes.

Q. Keep your voice up. A. All right.

Q. Go ahead. A. Said, "We want to take up where we left off Friday." And I said, "Well, Mrs. Gerlach, I'm sorry, but if that's what you want to talk to her about that is union business and she has asked me to represent her."

Q. And what did Mrs. Gerlach say, if anything? A. Well, she did say—she turned to Catherine and she said, "We used to be able to talk to you, Catherine." But Catherine then refused to go into the office without me.

Q. Yes. A. The union representative.

Q. All right. A. That was the end of it.

Q. Now, did you talk to Mr. Gerlach subsequently?

[50] A. Yes, we did.

Q. That day? A. Yes.

Q. Which one? A. Senior.

Q. All right. Where did you have this discussion with him? A. Into his office.

Q. Now, tell me what happened? A. Well, we went into his office. And I asked Mr. Gerlach if he was going to give Catherine her time card. And he said, no, he was not going to give her time card until she came into the office and talked to him in private.

Q. What did you say? A. I said, "Well, Mr. Gerlach, she wants union representation." And he said he would talk to one of us at a time. So I told him, I said, "Okay, Mr. Gerlach." I said, "we'll sit out there until you decide to give her her card."

So we went just outside the office door in the vestibule there. And we sat there and waited. He never did give her a card.

But then in the meantime my time card was pulled.

Q. Your time card was pulled? A. Yes.

Q. Now, did you make any explanation to Gerlach, Sr.

[51] as to why you were with King? A. I was a union steward and that was my duty.

Q. Did you tell him that? A. I told Mrs. Gerlach that.

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Q. On this occasion did you ask him what he wanted to talk to King about? A. Yes. I asked him.

Q. You asked him that? A. Yes.

Q. All right. What did he say, if anything? A. He said it wasn't none of my business.

Q. Did you say anything else? A. No.

[52] Q. Now, you say that you and King sat oustide of Gerlach, Sr.'s office, is that correct? A. Yes. That's right.

Q. During the day did he go by you two? A. Well, yes, he went by—

Trial Examiner: The answer is yes?

The Witness: Yes, sir.

Trial Examiner: All right.

Q. (By Mr. Gravitt) Did any conversation take place between either you or King and between Mr. Gerlach? A. No, sir.

Q. You said that your card was pulled on this date. What do you base that statement on? A. Well, Mrs. Gerlach went upstairs and got it. It must have been around seven-thirty.

Trial Examiner: I can't hear you.

Mr. Gravitt: Keep your voice up.

The Witness: Around seven-thirty I think it was when she went upstairs and got my card and brought it down.

Q. (By Mr. Gravitt) Then did you go to work on October 14th? A. No, sir, I didn't.

Q. Now, this is the day after you sat outside the office there with King I am talking about. Do you remember that day? [53] A. Yes.

Q. The next day did you go into the plant? A. Yes, sir, we went into the plant that day.

Q. Who was that? A. Catherine King and myself. We went on on Tuesday morning, which would have been the 13th.

Q. 14th? A. 14th. We went into the plant.

Q. All right. What happened then, if anything? A. We went into Mr. Gerlach's office. And I again asked Mr. Gerlach if he was going to give Catherine her time card.

Q. About what time of day was this? A. It was seven—I guess around seven-ten; something like that.

Q. Around working time? A. Yes. I—

Q. Go ahead with the conversation. What did he say? A. Well, he said he was not going to give Catherine her time card until she came into the office and sat down and talked to him in private. And I said, "Well, what about mine?" He said, "You're penalized two days for being away from your machine." So I said, "All right." So we went back home that morning.

Q. You and King went back home? A. Yes.

[54] Q. Now, the next day would have been a Wednesday, the 14th of October. Did you go to the plant? A. Yes, sir, we did.

Q. And was anyone with you? A. Yes, sir.

Q. Who was it? A. Catherine King.

Q. About what time of the day did you go to the plant? A. And Delila Mulford was with us.

Q. Delila Mulford? A. Yes, sir.

Q. I see. About what time of the day was this? A. This was the regular hour to go to work, seven o'clock.

Q. The regular working time? A. Regular working time. Yes, sir.

Q. I see. Now, did you talk with any of the Gerlach's on this occasion? A. Yes, sir, we did.

Q. To whom did you talk? A. Senior. Mr. Gerlach, Sr.

Q. Q. And just tell us the conversation. What was said? A. Well, our steward had reported back to work that morning—

Trial Examiner: No. Never mind that. You just give the conversation.

[55] The Witness: Well, he refused to give us our time cards and he said I was still penalized for another day. So we went back home again.

Q. (By Mr. Gravitt) Did you hear him say anything to King? A. No. I don't—I can't recall. It's been a long time.

Q. Well, do you now if King had her card on this occasion? A. No, she didn't have her card.

Q. Was the card mentioned? A. Yes.

Q. What was said? A. Mrs. Mulford asked for her card.

Q. Oh, Mrs. Mulford did? A. Miss Mulford did.

Q. Asked who? A. Asked Mr. Gerlach, Sr.

Q. And what happened then? A. He said that no, he wasn't going to give her her time card until she came into the office and talked in private.

Q. Until who came in the office? A. Catherine King. As for me he said I was penalized for another day.

Q. Now, on October the 16th, the following day, did you go to the plant? A. Yes, sir.

[56] Q. Your suspension was up then, right? A. Yes, sir.

Q. Was anybody with you on this occasion? A. Yes, sir.

Q. Who? A. Catherine King.

Q. Did you—Or did she go to work on this day? A. She reported to work that morning.

Q. And did you have any conversation with anyone of the Gerlachs? A. Yes, sir.

Q. Who? A. Well, Mrs. Kathryn Gerlach.

Q. Mrs. Kathryn Gerlach? A. Yes, sir.

Q. And about what time of the day was that? A. It was around seven-twenty or something like that.

Q. What time do you usually go to work there? A.Well, regular time is seven-fifteen, but the bell always rings at ten after.

Q. I see. Now, what was said on this occasion in your talk with Mrs. Gerlach?

Trial Examiner: Is this the same as Mary Kathryn in the complaint? Thank you.

The Witness: She asked me—We waited out in the [57] vetibule. Delila Mulford, our steward—

Mr. Jenkins: I'm sorry. I can't hear you. Would you talk up, please, 'mam?

The Witness: Yes. Catherine King, Delila Mulford and myself, we were sitting out by the office door. And Mrs. Gerlach came out and she asked me, she said, "Are you ready to go to work this morning?" And I said, "Yes 'mam." She said "Well," she said, "you can go to work. But I want you to tend to your business." So I went on upstairs to work.

Q. (By Mr. Gravitt) You went on to work? A. Yes.

Q. And where was King on this occasion? A. Her and Delila Mulford were sitting in the vestibule, just outside the office.

Q. Do you know if King went to work on this day? A. No, she didn't.

Q. Did Mulford? A. No. No, sir.

Q. Did you work all that morning? A. Yes. I worked that morning.

Q. Did you go to lunch? A. Yes.

Q. About what time? A. Eleven-thirty.

[58] Q. Do you go home at lunch? A. Yes.

Q. Did you talk to Mulford then while you were home at lunch? A. Yes.

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[59] Q. (By Mr. Gravitt) Were grievances discussed? A. Yes.

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Q. (By Mr. Gravitt) Now, you went back to the plant before the noon hour was up, didn't you? A. Yes.

Q. Now, did you take any action—

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Q. (By Mr. Gravitt) Did you go back to the plant? A. Yes.

Q. About what time was it then when you got back to the [60] plant? A. It was around ten till tweleve.

Q. And what time does the lunch hour end? A. Well, the bell usually rings at five till.

Q. You are sure of this? A. I am positive.

Q. All right. Now, when you arrived at the plant on this occasion did you take any action based on your grievance discussion with King and Mulford? A. Yes, sir, I did.

Q. What did you do? A. Well, I went into the office to present the grievances to Junior Gerlach.

Q. All right. Did you talk to him? A. Yes, sir.

Q. What did you do and what did he say? A. I went back to his office. And I told him, I said, "Junior, I have some grievances for you." And he said, "I don't have time to fool with them damn things." He said, "I'm leaving town."

And I said, "Well, Junior, I'm sorroy, but you will have to take them." Because I had them there and after you file them and all you have to present them.

So I laid them down on his desk and when I did he grabbed them and threw then in the trash.

Q. Did you tell him whose grievances they were? [61] A. No, I didn't tell him whose grievances they were. I just laid them on his desk. And he threw then in the trash can.

Q. Who threw them in the trash can? A. Junior Gerlach.

Q. And what happened then, if anything? A. Well, I told him, "Junior," I said, "you'd better not destroy those grievances." And I left and went back out into the cafeteria.

And when I did, why, of course he followed me out and went upstairs and pulled my time card. When he came back down he said, "Martha," he said, "you worked this morning, but you're not working this afternoon." And he said, "You're nothing but a damn smart aleck." And I said, "Well, you're a smart aleck, too, Junior, but" I said, "that's beside the point."

Q. And then did you have any conversation with Gerlach, Sr." A. Yes, sir, I did.

Q. And where did that conversation take place? A. In Mr. Gerlach's office. Gerlach, Sr.'s office.

Q. All right. What was said on this occasion? A. Well, I went into his office. And I asked him, I said, "Is he telling me that I'm fired?" And he said, "You heard what he said," He said, "You worked this morning but you're not working this afternoon."

[62] Q. Gerlach, Sr. telling you this? A. Yes.

Q. Proceed. A. He said, "He didn't say you was fired." I said, "Well, what am I supposed to do?" He said, "Just go on home." He said, "You wanted to draw your unemployment now go on and draw it." And I said, "Just like that" Go on and draw my unemployment?" And he said, "Yes." And I turned around and I said, "Mr. Gerlach," I said, "you know something," I said, "you don't know how to run a business."

He's got a lot of girls up there working. And that's what I said. But—

Q. And then you went home? A. Yes. No. Wait just a minute. That wasn't all of it.

Q. All right. Anything else? Tell me. A. He said "Yeah." He said, "I see that somebody else wouldn't know how to run a business." He said, "Your husband tried that once too, didn't he, and it didn't work, too?" And I said, "That's right, Mr. Gerlach." I said, "That's exactly right." And I left the office.

Q. Now, you left the office? A. Yes.

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[63] Q. (By Mr. Gravitt) You know a Katherine Stephens, do you not? A. Yes, that's right.

Q. Who is she? A. She's the secretary to the company.

Q. After you got home did you telephone her? A. Yes, sir, I did.

Q. And you got her on the phone? A. Yes, sir.

Q. And about what time of the day was this? A. This was sometime in the afternoon just after I had gone home.

Q. On October 16th? A. On October 16th.

Q. All right. Now, tell me what was said on this [64] occasion? A. I called Katherine Stephens and I asked her to ask Mr. Gerlach if he wanted me to report back to work the next day. And he said, "No."

Q. Wait a minute. You are talking to her? A. Yes.

Q. Well, did you hear his voice? A. Yes, I did.

Q. And what did he say? A. He said, "No."

Q. Did she say anything to you then? A. Yes. She said, "he said no." And I said, "Well, you tell him that he can reach me at my home phone when he needs me." And he turned around and he said, "Well, I'll call her if I need her."

Q. Did he ever call you? A. No, sir, never did.

Q. Did he ever notify you in any way to come to work? A. No, sir; they haven't.

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[65] CROSS EXAMINATION

Q. (By Mr. Jenking) Mrs. Cochran, when were you elected secretary of the union? A. On or about the 15th of April.

Q. That would be 1969? A. Yes, sir.

Q. And who was elected? Were chairladies elected at [66] at that time? A. Yes, sir, they was.

Q. Okay. Who was that? A. That was Virginia Holland.

Q. Virginia Holland? A. Yes, sir.

Q. And was there an assistant chairlady elected at that time, also? A. Yes, sir.

Q. And who was that? A. That was me, myself.

Q. And did you, as secretary did you give any notice to the company about who was a chairlady and assistant chairlady? A. No. The—

Trial Examiner: The answer is no.

The Witness: No.

Trial Examiner: Let's not volunteer anything.

Q. (By Mr. Jenkins) Then in October of 1969 you were still serving as assistant chairlady? A. Yes, sir. That's right.

Q. And was Virginia Holland still serving as chairlady? A. No, sir.

Q. What had happend to her? A. Well, she had been asked to resign.

[67] Q. You mean by the union? A. Yes, sir.

Q. When was this or when did she resign, if she did? A. She resigned in August, I believe. I'm not exactly sure of the date, but it was somewhere around there.

Q. And was somebody else elected? A. Yes, sir.

Q. Who was that? A. Delia Mulford.

Q. And as secretary of the union did you give any notice to the company about this change of chairladies? A. No, sir, I didn't.

Q. And this Catherine King that we have, is she an officer of the union? A. No, sir, she wasn't.

Q. She didn't have any position of authority with the union at all, did she? A. No, sir. Just a member.

Q. Prior to this time in October, that's the subject matter of this hearing here, beginning about the 19th of October in '69, had you ever handled any grievances yourself with the company? A. Yes, sir, I had.

Q. Who with? A. I took a grievance to Junior one day in the office.

[68] Q. And when was this? A. That was in, I think that was in August. I'm not sure of the date.

Q. Did you take it to him and give it to him personally or just leave it there? A. Yes, sir. I took it to him.

Q. Did you explain to him at that time that you were an assistant chairlady or was that discussed? A. He was aware of me being—

Q. I am asking you what you explained, not what he knows. A. I—

Q. Did you tell him anything about your position with the union at that time? A. No, I didn't tell him at that time.

Trial Examiner: I want to ask a question. Any side may object. I would like someone to ask this question rather than I. How large of a plant is this? Can you agree on it? How many employees?

Mr. Rubenstein: Are you talking about in October, at the time.

Trial Examiner: Yes.

Mr. Jenkins: Your Honor, it fluctuates consistently depending on business conditions. Right now there are about sixty people employed. Back last October I understand about eighty. If fluctuates according to business needs.

[69] Mr. Rubenstein: Yes. I think that's correct.

Trial Examiner: All right.

Mr. Rubenstein: It fluctuates between sixty and eigthy.

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Q. (By Mr. Jenkins) You testified about a conversation on October 16th, 1969 with Mr. Gerlach, Jr. after lunch when you went into his office to present some grievances? A. Yes, sir.

Q. Was anyone else present at that time other than yourself and Mr. Gerlach, Jr.? A. Yes, sir, there was.

Q. Who else was present? A. I don't know who he was. But there was a little boy in there.

Q. One who? A. There was a young boy present.

[70] Q. Someone who did not work at the plant? A. Right. Yes.

Q. Was anyone else present? A. No, sir.

Q. Do you know whether or not anyone else was outside of the office door within hearing distance? A. No, sir; there wasn't.

Q. Do you know whether or not, prior to October 10th, 1969, on numerous occasions Catherine King had either called and/or been called to Mr. Gerlach, Sr.'s office for private discussion? A. No, sir. I'm not aware of that.

Q. You are not denying it? You are just saying you don't know? Is that your answer? A. That's right. I don't know about it.

Q. Now, is there a rule at the company that you are not supposed to leave your position during working time at a machine without approval? A. No, sir.

Q. In other words, you can, anybody in the plant can jump up and leave their machine at any time during working time without getting permission of the company and that's the way that it works? A. No, sir. That is not the way it works.

Q. Well, I asked you if there was a rule requiring [71] permission. Can you explain what the practice is on this? A. Yes, sir; I can.

Q. All right. A. To take up grievances. That is the one thing I was talking about there. Of course we don't, we shouldn't have to get permission I feel to—

Q. Now, I am not asking you about what you should do. I am asking you whether or not, regardless of what the subject matter is, grievances or anything else, isn't there a rule in force at the plant and an understanding among all of the people that if you leave your work station for any reason you get permission during work time, or during working time? Isn't that the policy? A. That is the policy of leaving to go outside or home or something of that sort.

Q. Isn't that the policy also—

Mr. Gravitt: Object to cutting the witness off in her answer.

Trial Examiner: I don't think she had been cut off. She finished. Didn't you?

Go ahead, Mr. Jenkins.

Q. (By Mr. Jenkins) Wasn't that the policy of leaving your work station for any purpose? You reported to the production manager and asked for permission to leave, isn't that the company [72] policy? A. Well, I'm going to be frankly honest with you.

Q. I hope so. A. That is not the purpose of grievance.

Q. Now, you are misinterpreting—

Trial Examiner: The question is can any employee leave his place without permission.

The Witness: No. No.

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[73] Q. (By Mr. Jenkins) Now, on October the 13th you reported for work that morning, didn't you? Did you leave your work station that day to go with Catherine King? A. No, sir. I hadn't reported into work yet.

Q. Well, I understood you on direct examination to say that you reported for work. Are you now saying you reported but you didn't start or what? I am just trying to understand. A. See, we went in the cafeteria at seven o'clock. The bell [74] rings at ten after.

Q. Now, as I understand it, going back to the discussion which you testified about on October 16th, you went to Mr. Gerlach's, Mr. Gerlach, Sr.'s office that afternoon to ask him if you had been fired? A. Yes, sir.

Q. And you referred to the convesation that you had immediately had preceding that with Mr. Gerlach, Jr.? A. Yes, sir.

Q. And in answer to a question by you Mr. Gerlach, Sr. specifically said that he did not say you were fired? A. That's right.

Q. Is that what he said? A. (Nodded).

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(The witness was excused.)

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[76] **Elizabeth Wiley**

was called as a witness by and on behalf of the General Counsel and, after being first duly sworn, was examined and testified as follows:

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DIRECT EXAMINATION

Q. (By Mr. Gravitt) What is your position with the union? A. I'm business agent with the International Ladies' Garment Workers.

Q. And you service the Quality Manufacturing Company? A. Yes, sir.

Q. Directing your attention to October 20th, did you attempt to take up a grievance with Respondent in any way? A. Yes, sir; I did.

[77] Q. And who did you talk with? A. Mr. Lawrence Gerlach, Sr.

Q. And where did you talk to him? A. I talked to him just outside of his office.

Q. And did you discuss with him the three girls not working; King, Cochran, and Mulford? A. Yes, sir; I did.

Q. Now, you tell me what you said and what was said about them. A. I asked him why the girls was not working. and he stated, "Well, they'd been giving me a lot of trouble. And Catherine didn't want to come into the office and talk to me without a union representation. And that I am not going to allow."

Q. Do you recall anything else he said? A. In the office he said to me, "Look, Miss Wiley, I don't want to talk to you about this problem or any other damn union problem that your members bring up now or ever because if

they don't, if the girls don't go to work and start doing their jobs I'm going to close the plant."

Q. Now, directing your attention to October 28th did you have any further discussion with Respondents? A. Yes, sir. On—

Q. And who did you talk with at this time? A. I talked to Lawrence Gerlach, Jr.

Q. Gerlach, Jr. And where did the convesation take [78] place? A. It was in his office.

Q. All right. What was said? A. He got into the discussion about the three girls that were involved that was not working. And so he proceeded, he didn't get into any conversation right then about the three people.

Q. What did he say? A. He proceeded to tell me that he was sick and tired of the members trying to run his plant or sick and tired of the union telling him what to do and how to run his plant and he wasn't going to put up with it. After all, he was a sick man and he couldn't stand the worry and the aggravation of all these problems.

Q. Did he mention a layoff, general layoff? A. He mentioned that he would close the plant. That he could not stand it. And his mother and father, they didn't need the money anyway. And he—

Q. Did he tell you he couldn't stand what? A. That he didn't need the money. That he didn't need the work and aggravation. His mother and father didn't need the money.

Q. Do you recall a layoff of some employees around October 28th and 39th? A. On October the 30th there was a layoff.

[79] Q. Did you talke to anyone at the company about the layoff? A. Yes, sir.

Q. Who? A. Mr. Lawrence Gerlach, Jr.

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[80] Q. (By Mr. Gravitt) Now, did you have a conversation at any time with Mr. Gerlach, Jr. about a layoff on October the 28th, or on or about that date? A. Yes, sir. I had a conversation with him on October 28th in his office.

Q. All right. Now, tell us about it. What was said? A. I asked him if he had a lot of work. And he said, "No." He said, "I don't want any work." He said, "I don't want any work as long as I'm having all this union trouble and worry and aggravation." And he said, "It's a constant turmoil in here, constantly. I can't stand. I'm sick." And I said, "Can Mr. Marcus supply you with work?" And he said, "Yes, sir; he can supply me with work."

Q. Who did? A. Mr. Marcus is a contractor. The manufacturer that he works for.

Q. Now, diecting your attention to November 13th 1969, did you have any conversation with any of the Gerlachs? [81] A. Yes, sir.

Q. Who? A. Lawrence Gerlach, Jr.

Q. And where did the conversation take place? A. In his office.

Q. And what was said? A. At that time we did talk about the three girls. And I asked him if they would let the girls return to work. He said, "Absolutely not." That his mother and father would not ever agree to bring the three back to work. And—

Q. And did he give you any explanation as to why they couldn't return? A. That they was nothing but trouble makers.

Q. Who said that?

Mr. Jenkins: I couldn't hear the answer. I'm sorry.

Trial Examiner: She said that they were nothing but trouble makers.

Q. (By Mr. Gravitt) Who made that statement? A. Lawrence Gerlach, Jr.

Q. Now, after this November 13th conversation did you have another conversation with Mr. Gerlach? A. Yes, sir; I did.

Q. And when was that? A. It was on the 25th day of November.

Q. And where was the conversation? A. In Mr. Gerlach, Jr.'s office.

Q. And what was said on this occasion? A. Again I attempted to try to discuss—

Q. Just tell us what you said and what he said. A. Well, I tried to discuss with him the three people that were involved. And I absolutely got nowhere.

Q. Just tell us what he said.

Mr. Jenkins: I object to the characterization.

Trial Examiner: All right. That last answer may be stricken.

Mr. Gravitt: See, you have got to tell us what you said and what he said to get it in evidence.

The Witness: He said to me that he absolutely would not bring the girls back. His mother and father would not agree to bring the girls back and no court in the land could make them bring them back and if they was to be forced to bring them back in any way whatsoever that they would close the plant, make apartments out of the building. And that was it. So absolutely they would not bring these three trouble makers back to work.

Q. (By Mr. Gravitt) That's what he told you? A. Yes, sir.

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[84] Cross Examination

Q. (By Mr. Jenkins) How many people were laid off on October the 30th? A. Sir, I really can't give you an answer on that. I don't know.

Q. Well, what kind of a layoff occurred, if you don't know how many? A. Well, I will say that nineth percent of the people were laid off.

Q. What do you base that on? Were you here? A. I was not here on November 30th. No, sir.

Q. Now, did you say November the 30th? A. I mean—

[85] Q. What date? A. I mean I was not here.

Q. What month are we talking about? A. I was not here at the day of the layoff.

Q. All right. What was the date of the layoff? And I also want to know what day of the week. A. October. October the 30th.

Q. October the 30th. All right. What day of the week was that on? A. I don't recall.

Q. Was it a working day? A. Yes, sir; I'm sure that it was.

Q. Do you know this or are you just guessing? A. I'll say that I'm only guessing because I don't know. I can't remember the calendar in my mind.

Q. All right. How many people worked on the 29th? A. This I do not know.

Q. How many people worked on the 30th? A. I don't know that any of them—

Q. How many of them worked on the 31st of October, 1969? A. I don't know that anyone worked.

Q. I am asking you if you know how many did or did not work? A. I'm telling you that I don't know.

Q. All right. How many worked on November 1st, 2nd, 3rd, or 4th? On any of those days in 1969? A. None that I [86] know of.

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Mr. Jenkins: How many people worked on November the 1st?

Mr. Rubenstein: That was not the question.

Mr. Jenkins: 2nd, 3rd, 4th, or 5th?

Trial Examiner: It doesn't matter whether it is or not. It is the present question.

Mr. Rubenstein: All right.

Trial Examiner: Or the current question.

[87] The Witness: No one worked to my knowledge. And I'm specifying union members.

Mr. Jenkins: Pardon?

Mr. Rubenstein: I'll object.

Mr. Jenkins: It's your witness. If she wants to volunteer it—

The Witness: I'll withdraw that statement. None.

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[88] Q. Does everybody who does production work at the plant, are they a member of the bargaining unit and the union? A. Yes, sir.

Q. Now, how many people worked on November the 6th? A. None that I know of.

Q. Well, are you saying that you just simply don't know at all whether anybody worked or not? Or are you saying that none of the union members worked on November 6th? What are you saying? I am trying to find out if you have knowledge or if you don't have knowledge. A. You're talking about—

Q. Let me put it this way to you. I want to know whether you know whether anybody worked in the production unit at this plant on November 6, 1969. Now, either you do know that they did work or you know that they did not work. A. I don't know that they did work.

[89] Q. Do you know that they didn't work? A. Would you repeat the question again? The last question.

Trial Examiner: The question is did you know that they did work?

The Witness: No, sir.

Q. (By Mr. Jenkins) Did you know that they did not work?

Trial Examiner: You've already asked that.

Mr. Jenkins: And your answer is no?

Trial Examiner: That's it.

Q. (By Mr. Jenkins) In other words your answer then is that you don't know whether anybody worked or not on November 6th, is that not correct? A. Yes, sir.

Q. Now, on November 7th—

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[91] Q. (By Mr. Jenkins) Do you know whether or not anybody did or did not work in the production unit on November 8th, 9th, and 10th—

Mr. Gravitt: Objection.

Mr. Jenkins: —of 1969?

Trial Examiner: He has taken her through the 29th through the 7th. So I will allow that question. He is allowed [92] to go up to the 10th.

The Witness: 8th, 9th, and 10th? Is that what you're asking?

Trial Examiner: Of November, 1969.

The Witness: I was not there. But I had word through my chairlady that part of the cutting room had begun to return to work.

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Q. (By Mr. Jenkins) Well, then to follow it up. I understand that of your own knowledge, direct knowledge that you do not know? That's what you said? A. No, sir, I was not there.

Q. And, therefore, you do not know?

Trial Examiner: She has already answered that. And I am going to let the record show she doesn't know of her own [93] knowledge.

Q. (By Mr. Jenkins) And your earlier testimony then that there was a layoff at the plant beginning sometime about October the 28th was based upon something someone else told you? A. The layoff had begin the 28th when I was there. There was already people laid off then.

Q. And thereafter any information you have is based solely on what somebody else told you? A. Through my chairlady, who I work with.

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[94] Q. (By Mr. Jenkins) Now, when you had a conversation with Mr. Gerlach, Jr. on October the 28th, 1969, he told you at that time, as I understand it, that he did not have any work, is that correct? A. And he didn't want any work.

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was called as a witness by and on behalf of the General Counsel and, after being first duly sworn, was examined and testified as follows:

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DIRECT EXAMINATION

[96] Q. (By Mr. Gravitt) How long have you worked for the Respondent before leaving the plant? A. From November '57, to October, '69.

Q. And what was your job in the plant in October of '69? A. I was piecing skirts at the time.

Trial Examiner: What?

The Witness: Piecing front skirts at the time in '69.

Q. (By Mr. Gravitt) Did you hold any particular job with the union? A. Yes. I'm union chairlady.

Q. How long have you served in that capacity? A. Around two months.

Q. Now, do you know Mrs. Wiley? A. Yes.

Q. And did you discuss this chairlady with her? A. Yes.

Q. Do you know if she ever notified the company? [97] A. Yes; she notified them.

Q. In that way? A. Well, I appeared with them and Nick Bannano and a couple of the other executive board at one time and was told that I was the union chairlady.

Q. Where was this meeting? A. In the restaurant at the plant.

Q. Do you recall ever informing the company of this matter? A. At that time.

Q. At that time. How was it done? A. Well, we had a meeting at that time and I told them that I was union chairlady and that I would like to have our seniority list.

Q. Told you? A. Mr. Gerlach and Mrs. Gerlach.

Q. And can you give us the best date on this? A. It was sometime in August.

Q. Of what year? A. I don't—Of '69.

Q. Of '69. Now, directing your attention to October 10, 1969, did you attend any meeting with the company? A. Yes. I—

Q. And where was this meeting? A. In the front office of Mr. Gerlach, Sr. But the senior and the junior both [98] was there and Mrs. Gerlach.

Q. And who else was there? A. And Mrs. Gerlach. And I took Catherine King, Ruby Keefer, and Mary Jo Kits to talk about the piece rates.

Q. And why were you there? A. I was a chairlady.

Q. Tell us what happened at the meeting. Tell us what was said.

Trial Examiner: We are not going into the merits of whether they were entitled to a piece rate or not.

Mr. Gravitt: All right.

Trial Examiner: The fact that they discussed piece rate is enough to show that they engaged in this.

Q. (By Mr. Gravitt) Other than discussing piece rates did anyone in the company make any remark to you about your job? A. Junior Gerlach told me that, at the time, that when I had a complaint, a good complaint to come in and he would hear me. And he cursed and told me to get out and if we didn't like the way it was there in the company to go elsewhere.

Q. Do you know Catherine King? A. Yes, I do.

Q. And what job did she have at the plant in October before she left? A. Machine operator.

[99] Q. Machine operator. Did she work close to you? A. Across from me.

Q. What do you mean? Describe it please. A. Right—Well, my machine was on one side and then her machine was on the opposite.

Q. About how far away were they? A. Oh, about four or five feet.

Q. Now, on October 10th do you recall King have any discussion with any supervisor or boss? A. Well, October the 10th, after we came back—it must have been after we had our recess. And Miss Gerlach came and I heard her and Catherine having an argument.

Q. What did Mrs. Gerlach say? A. She told Catherine to mind her own business. And Catherine said, "I'm minding my business." And she said, Mrs. Gerlach said something about if she'd mind her own business she'd make her time. Catherine said, "I'm making your time, but I'm not making my time."

Q. Well, do you recall any more of the conversation? A. No. Well, she said for Catherine to go to the office.

Q. Go to the office? A. Yes.

Q. What happened then, if anything? A. Well, Catherine got up and hollered for me to go with her.

[100] Q. What did she say? A. She said, "Come on, Delila, and go to the office with me." And so I got up and went.

Q. You got up and went? A. Yes, sir.

Q. Where did you go? A. I went as far as the restaurant.

Q. And what happened then? A. Well, Mr. Gerlach and Mrs. Gerlach said that for me to get back upstairs, I had no business down there. And so I told them that Catherine paid her dues and she was entitled to be there.

Q. You told Mrs. Gerlach that? A. Yes. And Mr. Gerlach.

Q. And who? A. Mr. and Mrs. Gerlach.

Q. You told both of them? A. Yes.

Q This is the senior you are talking about? A Yes.

Q. All right. Now, do you recall Mrs. Gerlach saying anything else to you? A. Well, she was told me I was endangering my job in being there. And so did Mr. Gerlach.

[101] Q. Mr. Gerlach told you that, too? A. Yes.

Q. And do you recall anything else being said on that day? A. Well, he told Catherine he wouldn't trust her any more. And Catherine said, "Mr. Gerlach, there's been a lot of lies told on me."

Mr. Jenkins: I'm sorry. I can't hear.

The Witness: "Mr. Gerlach," Catherine said to Mr. Gerlach, said, "Mr. Gerlach, there's been a lot of lies told on me. You're blaming the wrong girl."

Q. (By Mr. Gravitt) Did he make any response? A. Well, he said he'd never trust her any more.

Q. Now, directing your attention to October the 12th— A. Well, October the 12th—

Trial Examiner: There's no question.

Q. (By Mr. Gravitt) Did you go back to work?

Trial Examiner: Wait for a question.

Q. (By Mr. Gravitt) Did you go back to work after this conversation with Mr. and Mr . Gerlach? A. Yes, I did.

Q. You went back to work? A. Yes.

[102] Q. All right. And then did you continue working the rest of the day? A. Yes, sir.

Q. Now, directing your attention to October the 12th, do you recall what day of the week that was? A. That was on Sunday evening.

Q. Did you have any discussion with Mrs. Gerlach? A. Yes. She called me on the phone.

Q. And what did she say? A. Told me she was relaying a message from Mr. Gerlach for me not to come in Monday and Tuesday and to report back on Wednesday.

Q. Did she tell you why? A. No.

Q. When was the next time you reported to the plant? A. That would have been on the 15th.

Q. The 15th you went to work? A. Yes, sir.

Q. What happened then? A. Well, I went in the office.

Q. Whose office? A. Mr. Gerlach's office. And he told me to mind my own business.

Q. Now, was this Senior or Junior? A. That was Senior.

[103] Q. All right. A. He told me he was going to give me my card, but for me to mind my own business. I told him I was minding my business, that Catherine had a right to union representation as well as anybody else and she wasn't the only one that I'd brought to the office at that

time. I brought Mary and Reba, also. But they just called Catherine out for the trouble.

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Q. (By Mr. Gravitt) Well, was King there with you on that occasion, the 15th when you went back to work? A. Her and Martha was in the restaurant.

Q. They were in the restaurant?

Trial Examiner: The question is were they with you when you talked to Mr. Gerlach.

The Witness: No. I was in the office by myself.

Trial Examiner: All right. The answer is no.

The Witness: That's right.

Q. (By Mr. Gravitt) Now, this was the first time you had been back to work since being suspended, is that right? A. That's right.

[104] Q. Was there any discussion of this suspension on this occasion? A. He told me at that time I was suspended for those, for coming off of the floor with Catherine King.

Q. With Catherine King? A. Yes.

Q. Did he say anything else about that? A. I can't remember anything right now.

Q. You can't remember anything now. Well, you had this conversation you have been telling us about with Mr. Gerlach, Sr.? A. Yes, sir.

Q. Well, what happened then? A. Well, he gave me my card and I went back to the restaurant.

Mr. Jenkins: Excuse me. Are we talking about the 15th of October?

Mr. Gravitt: Yes.

The Witness: Yes. That's right.

Mr. Jenkins: All right.

The Witness: He gave me my card. And I went as far as the restaurant and I asked Mrs. Gerlach about Martha and Catherine. They were in the restaurant and I was wanting to know what was going to happen to them.

[105] Q. (By Mr. Gravitt) What did she say? A. Well, she called Mr. Gerlach and said I wouldn't go upstairs until

I found out what was happening to Catherine and Martha. And they told me that Martha was suspended yet and that Catherine was wanted in the office without me.

Q. Who told you? You said they. Who said it? A. Mrs. Gerlach.

Q. Well, when you said Catherine you are talking about King? A. That's right.

Q. Was wanted in the office without you. Did you make any reply? A. Let's see. Well, they took me back in the office and talked to me.

Q. Who took you back in the office? A. Mrs. Gerlach.

Q. Mrs. Gerlach? A. Uh-huh.

Q. And what was said on this occasion? A. Well, of course we went over the whole thing again about, you know, Catherine and she was a trouble maker. And I—

Q. Who said she was a trouble maker? A. Mr. Gerlach.

Q. All right. Go ahead. A. And he didn't want her to—

[106] Q Just tell us what he said. Who said? A. Well, this is Mr. Gerlach.

Q. Mr.? A. Yes.

Q. All right. A. I went back in there And he told me that Catherine was a trouble maker and, of course, he told me some more personal things. And I said, "Her personal life don't concern me." I said, "She is paying her union dues and I was supposed to be there."

Q. And what did he say? A. And he told me I was going to get trouble for doing, for standing there and not minding my own business.

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Mr. Gravitt: Say it again. What did he tell you?

The Witness: Well, he told me to mind my own business. He told me that he was going to give me my card and I was going to go upstairs and mind my own business.

Q. (By Mr. Gravitt) And did you go upstairs? A. Yes. Catherine and Martha had left at that time.

Q. They had left?

Trial Examiner: The question is did you go upstairs.

[107] The Witness: Yes, sir.

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Q. (By Mr. Gravitt) You went upstairs? A. Yes.

Q. And did you continue working the rest of the day? A. Yes, sir.

Q. Did you go into work the next day? A. I went into the outer office that day.

Q. And what happened then? A. I was with Catherine and Martha. I was to stay there until I knew what was going to happen to them.

Q. Did you talk with anyone from the company? A. Yes.

Q. Who did you talk with? A. Mr. Gerlach.

Q. And where did you talk with him? A. In the outer office.

Q. This is Senior? A. Senior.

Q. And who was present? A. Catherine and Martha and Mrs. Gerlach.

[108] Q. What was said on this occasion? A. Well, Miss Gerlach gave Martha her card and she went upstairs. And she said Mr. Gerlach wanted to see Catherine in the office without me. Or she wanted to see Catherine in the office. Mr. Gerlach wanted to see Catherine in the office. And Miss Gerlach said, or Catherine said, "With Delila?" And Mrs. Gerlach repeated the question and he said, "No, not with Delila." And he told King if she went out the door that was it, she was finished. And so she didn't go in the office without me. So she didn't have anything else to do but to go out.

Q. And what did you do? A. Well, I was in the office then. And I said, "Mr. Gerlach, do you want me to go back upstairs?" He said, "No. You've abandoned your job. You're finished."

Q. He told you you were finished? A. Yes.

Q. Did he tell you to do anything then? A. He told me to get out.

Q. Get out. Where was King? A. She was in the outer part of the office. I mean there is a place where you come into the door. That's where she was at at the time. And then there was the floor here and there was the restaurant. And I was in between them two places.

Q. Now, directing your attention to September 30, 1970, did you have any conversation with Mr. Gerlach, Jr.? A. That would have been in October?

[109] Q. Or 1969. I'm sorry. A. In '69. In October of '69?

Trial Examiner: No. This is September 30th.

Mr. Gravitt: September 30th.

The Witness: September 30th. Well, I know at that time we made out a grievance.

Q. (By Mr. Gravitt) You made out a grievance? A. Yes.

Q. Did you do anything with the grievance? A. Yes. The following day I took the grievance into Junior Gerlach.

Q. And what was said on this occasion? A. Well, he told me that he wasn't going to fool with that grievance, that he was going to close the plant down around December the 1st. But he told me he realized I was doing my job and he would hold no hard feelings toward me at all.

Q. About what time of the day was this? A. Noon hour.

Q. At noon hour.

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[110] CROSS EXAMINATION

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Q. (By Mr. Jenkins) Mrs. Mulford, you testified here about some conversations and gathering that you had on December— [111] or excuse me—beginning in October, October the 10, 1969 and then continuing over into the following week. And these matters, as I take it, insofar as we are interested in these proceedings, pertained to Catherine King, didn't they? A. Yes.

Q. Now, at the time that you had these conversations on

October the 10th was there any pending grievance with respect to Catherine King? A. No.

Q. Let me refresh your— A. No.

Trial Examiner: She has answered the question no.

The Witness: Just—

Mr. Jenkins: No. All right. Fine.

Q. (By Mr. Jenkins) If and when, if you know, was a grievance with respect to any matters pertaining to Catherine King filed by the union? A. We just had that complaint on October the 10th, when I took the complaint in to Junior Gerlach and asked him—

Q. Let me interrupt you there just a minute. To make it clear, as I understand that complaint that you are talking about, that is a piece work matter? A. Yes.

Q. That didn't involve Catherine King, did it? A. Yes, sir.

[112] Q. Well, isn't it true that Catherine King always made her piece rate so that she was not really involved in that grievance? A. I took her in the office with me and Mary and Reba.

Trial Examiner: Can you answer the question? Was she involved in that case?

The Witness: Yes.

Q. (By Mr. Jenkins) Well, how was she involved in that grievance? There was no problem with her piece rate was there? A. She wasn't making out. Or she was just making it. And she used to make aroundt $20.00 a day where she was just making her time, or the company's time. That would be $13.60.

Trial Examiner: I don't want to get into the merits of that. The question was she involved or not. That is all I'm interested in. I don't care whether she was making her time or not. I'm not going into the merits, as I said when Mr. Gravitt examined the witness, of that grievance.

Q. (By Mr. Jenkins) All right. Other than that grievance then there were, or the business about the piece rates, other than that was there any grievance filed on that day

with respect to any other matters pertaining to Catherine King? A. Was no grievance filed.

Q. All right. Now, if and when was a grievance filed [113] thereafter with respect to Catherine King? A. There was no grievance filed.

Trial Examiner: Ever. The question is ever.

The Witness: While I was chairlady.

Trial Examiner: All right.

Q. (By Mr. Jenkins) No grievance was filed? A. I never took no grievance in while she was—

Q. And if there had been a grievance filed as chairlady you would know about it, wouldn't you? . Yes.

Q. Now, you testified that on October the 10th of 1969, I believe sometime in the afternoon, you heard a conversation up on the plant floor between Mrs. Gerlach and King? A. That's right.

Q. What was Mrs. Gerlach's position on the plant floor? A. She was the plant manager. I think plant manager or supervisor.

Q. Was the correct title production manager? A. It could be that. I don't know for sure.

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[115] Q. (By Mr. Jenkins) Now, Mrs. Mulford, you testified about this conversation between Mrs. Gerlach, Sr., the production manager, and Catherine King on October the 10th of '69 and that at the conclusion of that conversation you went downstairs with those two ladies to Mr. Gerlach, Sr.'s office, is that correct? A. I didn't get to the office. I went to the restaurant.

Q. You all went to the restaurant then? A. Yes.

Q. Yes. Now, prior to leaving your work station did you request permission from the production manager to leave your work station? A. No. Catherine called me to go with her, sir.

Q. Now, you just answer the question. A. No, I never asked her permission. No.

[116] Q. (By Mr. Jenkins) I will repeat the question for you, Mrs. Mulford. Am I correct in assuming then that on the afternoon of October 10th you left your machine without having received permission from the production supervisor and went downstairs, either with or following King and Mrs. Gerlach, Sr.? A. That's right.

Q. Now, when you got downstairs at the restaurant you were told by Mr. and Mrs. Gerlach, as I understand your testimony, that you should return to your work station? A. That's right.

Q. And then you engaged in a further conversation with Mr. and Mrs. Gerlach, but eventually you did go back to work that afternoon, is that right? A. Right.

Q. Now, on Sunday, October 12th, when you received this phone call from Mrs. Gerlach did she tell you that because you left your work station without permission on Friday, the 10th, you were going to be suspended for Monday and Tuesday? A. No, sir; she didn't say that.

[117] Q. Well, what did she say? A. Said she was delivering a message from Mr. Gerlach for me not to report in on Monday and Tuesday and report to Mr. Gerlach on Wednesday. And that's all she told me.

Q. Well, you knew why you had this suspension, didn't you? A. I didn't know at the time I was suspended, until the time I went into the office.

Q. Well, when you had this conversation on Sunday evening on the telephone with Mrs. Gerlach and she informed you that you were suspended, to be suspended on the next Monday— A. She didn't say I was suspended.

Q. Pardon? A. She just told me not to report on Monday and Tuesday and to report on Wednesday. She didn't say nothing about being suspended.

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Q. (By Mr. Jenkins) And you knew why it was that you [118] were not to report to work on Monday and Tuesday, didn't you? A. Yes, I knew.

Q. And the reason was because you had violated the company rule by leaving your work station on Friday without permission, isn't that correct? A. I wasn't violating no rule.

Q. I didn't— A. I wasn't violating no rule. No rule.

Q. Pardon? A. I wasn't violating any rule against the company. That was my job to come off the floor with Catherine King.

Q. Well, regardless of what you considered your job to be you knew that the reason the company was laying you off on Monday and Tuesday was because you had left your job without permission, didn't you? Regardless of whether they are right or wrong in that, but you knew that was the reason you were not going to be working on Monday or Tuesday? A. Yes.

Q. Now, you testified that on October the 15th, which was on a Wednesday, you came back and you testified that Mr. Gerlach said that King was, I think your words were a "trouble maker," end of quotation, right? A. Yes, sir.

Q. And that he told you some personal things about her, [119] right? That was your earlier testimony? A. Yes, that's right.

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[120] Q. (By Mr. Jenkins) After you had this discussion on October the 15th, with Mr. Gerlach, relative to what you testified to earlier as personal things and other business, then I believe your testimony is that you went back to work then for the rest of the day, is that correct? A. After Catherine and Martha left the plant?

Trial Examiner: You just answer the question.

The Witness: Yes.

Trial Examiner: All right. The answer is yes.

[121] Q. (By Mr. Jenkins) Now, on the 16th what time were you scheduled to go to work? A. Seven-fifteen, but they ring the bell at seven-ten.

Q. Was it seven-fifteen that you were supposed to be at your station? A. Yes.

Q. Were you at your work station on that day? A. No. I was down in the office, outer office.

Q. You did not report at seven-fifteen, is that right, to your work station? A. I was there at the office.

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[122] **Mary Choquette**

was called as a witness by and on behalf of the General Counsel and, after being first duly sworn, was examined and testified as follows:

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[123] DIRECT EXAMINATION

Q. (By Mr. Gravitt) Where are you employed? A. Quality Manufacturing Company.

Q. How long have you worked there? A. It will be about sixteen years in October. The 26th of October.

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[124] Q. (By Mr. Gravitt) Did you attend this meeting on October the 10th, 1969? A. Which meeting?

Q. This grievance meeting. A. Yes, sir.

Q. Sir? A. Yes, sir.

Q. Excuse me. Was Mulford there? A. Yes, sir.

Q. And in what capacity? A. She was our chairlady.

Q. And who represented the company? A. Well, it was Mr. Gerlach, Miss Gerlach, Sr., and Mr. Gerlach, Jr. was in there.

Q. Did you discuss piece rates and various matters relating to working conditions? A. Well, Delila told them that's what he was in there for.

Q. And what did he say to her? A. Well, he said he wasn't going to discuss it because—

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[125] The Witness: Junior said he wasn't going to do anything about it, discuss, because they had spent a lot of money on his brother to learn that work. And he said he'd be damned if he wasn't getting tired of us coming in

there bothering him. He said when we had a good complaint he'd listen to it.

Q. (By Mr. Gravitt) Do you recall Gerlach, Jr. saying anything else? A. Well, Mr. Gerlach started to say something. But he said something about what's the difference in the price. Or what's the difference in the skirts.

Q. Now, who is that? A. That's Mr. Gerlach, Sr. And Junior spoke up and he said anybody that wasn't making out on then could get the hell out and go where they could.

Q. Who said that? A. Junior.

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[126] Q. (By Mr. Gravitt) And do you remember whether King was there or not, Catherine King? A. Yes, sir; she was there.

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[128] **Vonna Oliver**

was called as a witness by and on behalf of the General Counsel and, after being first duly sworn, was examined and testified as follows:

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DIRECT EXAMINATION

Q. (By Mr. Gravitt) Who is your floor lady? A. My production manager is Mrs. Gerlach and my floor lady is Helen Rice.

Q. And you were laid off on October 28th? [129] A. Around that time. I don't know exactly what date.

Q. Within a day or so either way? A. Uh-huh.

Q. All right. And did Mrs. Rice lay you off? A. Yeah.

Q. What did she tell you? A. She said, "Well, Vonna," she said, "this is all we've got for you today." Said, "We've run the work out." She said, "I'll have to let you go." And she said, "I don't know when we'll call you back. Until this mess gets straightened up I just don't know." That was her words.

Q. I see. Now, when did you go back to work? A. Around November. In November sometime, but I can't tell you the exact date because I don't remember.

Q. Do you hold any position with the union? A. Yes, sir. I'm on the executive board.

Q. You have— Strike that. There is testimony that there was discussion between Gerlach, Jr. and Cochran on October the 16th. Did you hear any of that discussion? A. Part of it.

Q. What part did you hear? A. As Martha was— I'll start from the beginning. We went out to lunch.

Trial Examiner: No. You just answer the question.

The Witness: Yes.

[130] Trial Examiner: What part?

The Witness: Well, the part I heard was after Martha went into the office with the grievances. I was in the booth. It was our lunch time. And she came back out and Junior came out behind her. He went upstairs and came back down and he had her card in his hand. And he told her, he said, "Martha," he said, "you worked this morning, but you will not work this afternoon. You're nothing but a damned smart aleck."

Q. (By Mr. Gravitt) Were you aware that Cochran was a chairlady? A. Yes, sir.

Q. How long had you been chairlady, if you know? A. She had been chairlady, assistant chairlady since we've had the union. And she was acting as chairlady since we had none in the plant at the time.

Q. And who was the chairlady before? A. Delila Mulford. First it was Virginia Holland and then Delila Mulford was our chairlady.

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[131] DIRECT EXAMINATION (FURTHER)

[132] Q. (By Mr. Gravitt) Mrs. Oliver, you testified that you were laid off in the latter part of October, 1969. Were other employees laid off at this time? A. Yes, sir.

Q. Can you tell us who? A. Well, all of us were laid off.

Q. What do you mean "all of us"? How many? A. All the machine operators that work on the machines were off at one time.

Q. At one time? A. Uh-huh.

Mr. Gravitt: All right. No more questions. Thank you.

CROSS EXAMINATION

Q. (By Mr. Jenkins) And you say, Mrs. Oliver, you got back to work approximately on what date in November? A. I don't know what date in November. I didn't say. Because I don't remember. But I went back the first part of November.

Q. Would it be your best impression that it was during the first week in November? A. It was the first part of November. I just don't know the exact date. I couldn't say and be positive.

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[133] Q. (By Mr. Jenkins) You made some testimony here relative to a conversation on October 16th between Mr. Gerlach, Jr. and Mrs. Cochran? A. Yes, sir.

[134] Q. Do you remember that? A. Uh-huh.

Q. Now, you told us some of the things apparently that you heard Mr. Gerlach, Jr. say. What about Mrs. Cochran? Did you hear her say anything? A. Yes, I did.

Q. And what did you hear her say? A. She said—Well, when Junior said to Martha that she was a smart aleck she said, "You're a smart aleck, too, Junior."

Q. What else did you hear? A. Well, Martha—Junior went on to Mr. Gerlach's office and Martha went in behind him.

Q. Yes? A. And the only thing I heard, I was out in the lunch room sitting—

Trial Examiner: Just say what you heard.

The Witness: The only thing I heard was Martha saying, "That's right, Mr. Gerlach." That's all I heard.

Q. (By Mr. Jenkins) This was a conversation then that was taking place in Mr. Gerlach, Sr.'s or Mr. Gerlach, Jr.'s office? A. Mr. Gerlach, Sr.

Q. I see. And to your knowledge who was in the room at that time? A. In Mr. Gerlach's office?

[135] Q. Yes. A. To my knowledge I don't know. Because I couldn't see in there from where I was sitting.

Q. Well, you saw Mr. Gerlach and Mrs. Cochran go in the room, didn't you? A. Junior and—

Q. Yes. And insofar as you know was there anyone else in the room? A. No. I didn't—I couldn't see in there.

Q. So they were in there, the two of them with each other, having a conversation relative to these matters, weren't they? A. I don't know what they were having a conversation about because I didn't—I wasn't—

Q. Well, it was a continuation of the discussion that took place in your presence earlier, wasn't it? A. All I could hear her saying was that's right, Mr. Gerlach.

Q. And you don't know of anyone else that was present in the room, right? A. No, sir.

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[136] **Alice Hoschar**

was called as a witness by and on behalf of the General Counsel and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Mr. Gravitt) You are president of the local? A. Yes, sir.

Q. And have been for how long? A. Since April, 1969.

Q. And was Mulford chairlady? A. No, sir.

Q. Did she ever process any grievances to your knowledge? A. Yes.

[137] Q. Then she was a chairlady? She was a chairlady? A. Yes. But she wasn't the first chairlady.

Q. Oh, no. But she was one? A. Yes.

Q. And who was the chairlady prior to her? A. Virginia Holland.

Q. When did she resign? A. August 19, 1969.

Q. And then Mulford took over? A. Mulford took over.

Q. Do you know for a fact whether Cochran was ever acting as chairlady? A. She was sworn in as assistant chairlady at that time they elected her as assistant chairlady.

Q. Directing your attention to around October 29th or 30th, 1969, were you laid off? A. Yes, sir.

Q. Who is your floor lady? A. Helen Rice.

Q. Did she lay you off? A. Yes, sir.

Q. What did she tell you? A. She said, "Alice, I am going to have to lay ou off until this mess is straightened out."

Q. And when did you come back to work after the layoff? [138] A. November the 12th.

Q. 1969? A. 1969.

Q. So, were other employees laid off at this time? A. Yes, sir.

Q. Can you tell me approximately how many? A. All of them.

Q. All of them? A. All of them. All of the operators upstairs.

Q. Did you attend a meeting on January 12, 1970? A. Yes, sir.

Q. Where was the meeting? A. Down in Lawrence Gerlach, Jr.'s office.

Q. Who was present? A. Joel Goolst and myself and Lawrence, Jr.

Q. Did you discuss grievances? A. I asked him why—

Q. You asked who? A. I asked Lawrence Gerlach, Jr. why that Mary Goodnight was taken off of her operation.

Q. And what did he say?

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[139] Q. (By Mr. Gravitt) What did Gerlach, Jr. say to you about it? A. He asked me who was doing her operation.

Q. Yes? A. And I told him Maxine Warner, a younger girl.

Q. What did he say to you about discussing this matter with you? A. That was all that was discussed there at that time.

Q. Did you go back that afternoon and talk to him again? A. Yes, sir. Yes, sir.

Q. Oh, you did. You talked to Gerlach, Jr.? A. And Senior both.

Q. And Senior both? A. That's right.

Q. About a Grievance? A. They—Mr. Gerlach said he had a right to—

Mr. Jenkins: Let's identitify the Gerlachs.

[140] Mr. Gravitt: Yes.

Q. (By Mr. Gravitt) Will you tell us which one? A. —to take Mary Good night off of that operation and put her on another one.

Q. I see. A. And at that time Junior Gerlach told me, he said, "Alice, I want to tell you something." He said, "After you have punched your time card in I don't want you ever to come off of the floor with a girl."

Q. Do you recall him saying anything else? What would happen to you? A. No, he didn't say. But then Mr. Gerlach told me that was why that he had Delila Mulford suspended for coming off the floor with King.

Q. Which Gerlach was this? A. Senior.

Q. And when was this? A. October—Or January 12th, in the afternoon.

Q. On January the 12th now, prior to going down the second time, you were working, is that right? A. That's right.

Q. And how did it come about that you left work? A. Katherin Stephens, Mr. Gerlach's secretary came after me and said I was wanted in the office.

[141] Q. And then you went down after that? A. (Nodded).

Q. And then Mr. Gerlach, Sr. made this statement to you? A. That's right.

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CROSS EXAMINATION

Q. (By Mr. Jenkins) Mrs. Hoschar, do you remember being interviewed by somebody whose writing I cannot read and I am advised that his name may be Clarence Lowe? A. Yes, sir.

Q. About April 16, 1970, and signing an affidavit for him? [142] A. Yes, sir.

Q. I am going to ask you to take a look at this affidavit, which the counsel here for the General Counsel has furnished me. I want to direct your attention to the second page, the first paragraph, beginning at the top of that page . And I will ask you to read that paragraph, will you please?

Trial Examiner: Read it to yourself.

The Witness: Read it to myself.

(Short Pause.)

Q. (By Mr. Jenkins) Have you read that? A. Yes.

Q. Now, may I have the affidavit then? Now, with your memory refreshed by that paragraph, you testified here a few minutes ago about a conversation with a Mrs. Rice? A. That's right.

Q. Pertaining to a layoff during which conversation Mrs. Rice said that you were going to have to be laid off until this mess was straightened out, something like that? A. That's right.

Q. Now, having looked at this affidavit here, you testified early, if I understood you correctly, that this conversation referred to a layoff in October and early November of 1969. But having looked at your affidavit here are you correct in your testimony or does the conversation you related really refer and [143] pertain to a layoff in August of 1969? A. It was both times.

Trial Examiner: I didn't hear that.

The Witness: It was both times.

Q. (By Mr. Jenkins) You mean that this conversation you had with Mrs. Rice, that she used precisely these same words on both occasions? A. Something to that effect.

Q. Well, in this affidavit then I will ask you to read this next paragraph then, October the 29th, which is the second paragraph, beginning on page two.

(Short pause.)

Q. Have you now read that? A. I have read that.

Q. And there is no reference in there in connection with the October 29th layoff to any such statement by Mrs. Rice, is there? A. No, not in there. But I was laid off again in November.

Q. Well, I am asking you whether or not there was any reference to any such statement pertaining to the October 29th layoff in the affidavit which you gave to the Board agent? A. To October 29th?

Q. Yes.

Trial Examiner: The question is it in there. Do you want to look at it again?

The Witness: No. It isn't in there on that.

Trial Examiner: All right.

The Witness: That's right.

Q. (By Mr. Jenkins) Now, you testified, I believe, that you were president of the local union? A. Yes, sir.

Q. And when did you get to be president? A. April, 1969.

Q. You testified about a meeting that you had in Mr. Gerlach, Jr.'s office on January, in January of 1970? A. Yes, sir.

Q. From time to time during the fall of 1969 did you have meetings with Mr. Gerlach, Jr.? A. No, sir.

Q. But you did in January? A. In January.

Q. And have you had meetings with him on union matters since that time as president? A. The only time I can recall—I can't just recall the date—was when I went down and asked him. Was it—

Q. Well, I am just asking you—I don't want the sub-
[145] stance of the meeting. A. Oh, yes.

Q. What I am trying to really get at, Mrs. Hoschar, if there are matters pertaining to the union that you wanted to talk to him you feel free to talk with him and I presume he feels free to take with you, doesn't he? A. Yes, sir.

Q. And you deal with each other; he on behalf of the management of the company and you as president of the union, doesn't he? A. Yes, sir.

Q. Isn't that correct? A. Yes, sir.

Q. And that has continued since you got to be president of the union, hasn't it? A. Yes, sir.

Q. And that continues, that relationship, down to the present time, doesn't it? A. Yes, sir.

Q. And have you, in the conduct of your duties as president, observed the rule that after you have punched in you you do not come off the floor without permission? A. No, sir; I've never been off the floor without permission.

Q. Then you have observed that rule, have you not? A. I have.

[146] Q. And that is a company rule, isn't it? A. Well, as far as I know.

Q. Yes. And it has been that way as long as you can remember, hasn't it? A. Yes, sir.

Q. And you have worked for this company for how many years? A. Almost seventeen years.

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Trial Examiner: All right. Let the record show that General Counsel rests.

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[147] Trial Examiner: Charging Party's 1. Received.

(The above-referred to document was marked Charging Party's Exhibit No. 1 for identification and was received.)

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[148] **Martha Cochran**

was recalled as a witness by and on behalf of the Charging Party, was examined and testified further as follows:

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DIRECT EXAMINATION

Q. (By Mr. Rubenstein) Mrs. Cochran, are you the same Martha Cochran that testified this morning? Is that correct? A. That's right, sir.

Q. In your testimony this morning you testified concerning certain events before the lunch hour of October 16th? A. Yes. That's right.

Q. And I believe you testified that you took certain grievances in to Mr. Gerlach and he threw those grievances into the waste can? A. That's right, sir.

Q. When grievance forms are filled out, Mrs. Cochran, [149] how are they filled out? Is it one copy, two copies, three copies? A. I think it's three copies.

Q. And you— A. One goes to the office, the management, and one stays in the book and the other one goes to the business agent. I think that is the right procedure.

Mr. Rubenstein: Would you please mark this as Respondent's Exhibits—I mean Charging Party's Exhibit Nos. 2, 3, 4, and 5?

(The above-referred to documents were marked Charging Party's Exhibit Nos. 2, 3, 4, and 5, for identification.)

Q. (By Mr. Rubenstein) I hand you, Mrs. Cochran, four pieces of paper entitled grievance and it is grievance number 9563, which is Charging Party Exhibit 2; 9564, which is Charging Party's 3; 9566, which is Charging Party's 4; and 9567, which is Charging Party's 5. Could you tell us what they are?

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The Witness: These are the grievances that I had taken [150] into the office when Mr. Gerlach, Jr. threw them in the trash can.

Q. And those are the four grievances? A. Those are the four grievances.

Q. All right. And these are colored copies. Are these the original or a copy or what are these that I have? A. Well, there here are— These are not the original copies here. There is one copy that is written up. And these are carbon copies here.

Q. Right. And these were the carbon copies kept by the union, is that correct? A. Yes.

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[152] Q. (By Mr. Rubenstein) The grievances that you took in on October 16th, without going into the nature of the grievances, [153] whose grievances were they? A. They were one of Catherine King's—

Trial Examiner: Can't hear you.

The Witness: Catherine King's, Delilia Mulford's, and mine.

Q. (By Mr. Rubenstein) And your own? A. My own, yes.

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[155] Trial Examiner: Do you rest?

Mr. Rubenstein: I rest.

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[156] **Kathryn Gerlach**

was called as a witness by and on behalf of the Respondent and, after being first duly sworn, was examined and testified as follows:

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DIRECT EXAMINATION

Q. (By Mr. Jenkins) Now, Mrs. Gerlach, you are connected with Quality Manufacturing, aren't you? A. Yes.

Q. And I believe that you and your husband and your son are owners of this company, are you not? A. Yes, sir.

Q. And your general business is the manufacture of [157] women's clothing, right? A. Yes.

Q. And during the year 1969, at all times that are material in these proceedings, you had a position with that company, is that correct? A. Yes.

Q. What was your position? A. I am production manager.

Q. And as production manager would you tell us what just the general nature of your duties was, briefly? A. Well, my duties are to try to meet our orders on time.

Q. Yes. And do you work up on the floor with the production ladies or somewhere else? A. Yes. I'm on the floor.

Q. Now, if during the course of the work day, if one of the machine operators desires to leave her work during working time is there any procedure set up for this contingency? A. If it is a legitimate reason or—

Q. Well, what does the employee do? What is the procedure? A. She is supposed to ask permission to leave the floor.

Q. Now, who does she request this permission from? A. Well, she can either ask me or she can ask the floor lady.

Q. Who was the floor lady during October of last year? [158] A. Miss Rice.

Q. Helen Rice? A. Helen Rice.

Q. Is it a situation where there is any order? Like do they ask you if you are there or do they just ask either one? How does it work? A. They can either ask me or they can ask the floor lady. And the floor lady works through me.

Q. All right. A. She comes to me and we talk it over; whether or not we can spare that girl.

Q. I see. And how long has the company had this rule? A. Oh, every since we've been there, as far as I know.

Q. There has been introduced into evidence a union contract which is dated April 15, 1969. Was that the date that the union began being represented at the plant— A. Yes, sir.

Q. —this last time? And prior to this occasion was the union there before this at earlier years? A. You mean years back?

Q. Yes. Yes. You have had unions off and on for years, haven't you? A. Yes. Yes.

Q. You've had this same union then years before? A. Yes.

[159] Q. Weren't they in there for a number of years at one time? A. Yes, they were.

Q. And you are used to dealing with union? A. I'm use to dealing with unions.

Q. Yes. And during all of this time is it your testimony that you have or have not had this kind of a rule? A. We have always had this rule.

Q. Now, has the union, for example, ever objected to this rule? A. Never. Never that I know of. No.

Q. They always acquiesced in it? A. They always seemed that they wanted to go along.

Q. Right. And nobody from this union has ever made any objection to this rule? A. No.

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Q. (By Mr. Jenkins) Now, in October of 1969 there was an employee at the company by the namet of Catherine King, was there not? A. Yes.

Q. Do you recall just generally how long she had worked [160] for the company? A. I'm not sure about that. I know it's been quite a long time. But I couldn't tell you the exact number of years.

Q. Would you characterize it as a number of years anyway? A. A number of years. Number of years.

Q. And while she was there did she or did she not communicate or talk individually with members of the family? A. Very much so. Lots of times.

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[162] Q. (By Mr. Jenkins) Now, Mrs. Gerlach, back in October and prior to October the 10th, the day that has

been discussed in the testimony, was there any problem that developed with Catherine King over the use of a radio? A. Yes, there was.

Q. Now, can you tell me, and fix it in reference to the incidents on October the 10th, about how far before that it was just roughly, can you put it in a few days, weeks, or months? A. I would say just a few days.

Q. All right. A. Just a few days. And—

Q. Now, where were you at the time this problem came up? A. I was somewhere on the floor when the first, when the floor lady, when Mrs. Rice, when I talked to her about it the first time.

Q. And I think it is clear from the record that in your kind of work the floor lady is a supervisor, which we might call like a foreman in a manufacturing plant, is that right? A. Yes.

Q. In other words a management representative? A. Yes, that's right.

Q. All right. Who was present besides yourself involved [163] in this business? A. Well—

Q. And what happened? A. I'll tell you what happened.

Q. All right. A. She had a radio. She heard it.

Q. Now who is she? A. Miss Rice. She heard the radio. And she told, she went past her machine, her work station, and she said—

Q. Are we talking about Rice now or about King? A. We're talking about Miss Rice—

Q. All right. A. —went past Catherine King's work station.

Q. Yes? A. And she said, "Turn that radio down."

Q. Now, who made that statement? A. Miss Rice.

Q. Who did she make it to? A. To Catherine King.

Q. Did you hear it? A. No, I didn't hear it at that time.

Q. All right. Go ahead. A. Not at that time.

Q Go ahead.

Mr. Rubenstein: I move to strike.

Trial Examiner: Just what you heard.

[164] Q. (By Mr. Jenkins) Now, would you go ahead? A. Well, okay. I went back up the line.

Q. All right? A. And I heard the radio?

Q. Yes? A. And I said something. I said to the floor lady, "Where is that radio?" And she told me where it was. So I went down and told her to turn off the radio.

Q. Now, who the her? A. I told Catherine to turn off the radio.

Q. All right. Yes? A. I said, "Turn off the radio."

Q. Yes? A. That noise, you know, ahead of the machine running and all made a heck of a racket.

Q. Yes. A. And of course they weren't allowed in the place.

Q. Was that a company rule? A. That's right.

Q. All right. Go ahead. A. That's right.

Q. All right. A. So I told her to turn off the radio.

[165] Q. Yes? A. And she turned it off.

Q. Yes? All right. A. And that was all that happened then.

Q. Then what happened? Did anything happen after that? A. Well, then the next run-in I had with her was about the, when she was causing a disturbance on the floor.

Q. Let me ask you this, after this radio incident was there a lunch break and then did you come back to the floor after that? A. Now, I can't answer that to make sure. Because I don't exactly remember.

Q. All right. Then tell me what happened about the disturbance.

Mr. Rubenstein: And when was this?

Mr. Jenkins: Yes.

Trial Examiner: Was this the same day?

The Witness: No, I don't think it was the same day.

Trial Examiner: Was it later or before?

The Witness: No. It was after. She had been— And I'll stand back when a girl—

Trial Examiner: Please don't make any speeches. What happened on the disturbance? What was the disturbance and what did you do about it?

The Witness: All right. This was the same day they had been in the office about not being able to make their quota.

[166] Trial Examiner: All right.

Q. (By Mr. Jenkins) The production quota? A. The production quota.

Q. This has been pretty well established. A. You don't want me to tell that?

Q. No, I was just going to suggest to you that this has been pretty well established. A. I knew she had said it.

Q. That was October 10th? A. Yes. Yes. She had been in the office saying that she couldn't make the, they couldn't make the quota, see.

Q. Who is the she? A. Catherine King.

Q. Use names, please. A. Catherine King.

Q. All right. A. So I looked down the line awhile after this happened. And I saw her going through some kind of motions like this (indicating), waiving her arms. And the two girls that they had had in the office with them saying that they couldn't make their quota, their machines was stopped. They were sitting there just looking at her with their mouths open, didn't know what she was going. But she was trying to talk to somebody down the line.

So I went down and I said, "What is wrong here?"

[167] Q. Who did you make this statement to? A. I made this statement to Catherine King.

Q. All rght. A. I said, "What's wrong here? What's the condition?" And she said there is something about a repair. And I said, "Well, don't cause a disturbance in the place." I said, "If it's a repair fix it, if it's not just lay it down and let one of the floor girls get it and quit causing this disturbance." She said, "You tend to your business." I said, "I am tending to my business. This is my business. I am tending to it."

Q. Yes, And then what happend next? A. And so then she said something. I can't recall just exactly what it was, but she sassed me. And I—

Q. Well, give us your best recollection of what she said. A. Yeah. Well, just for me to tend to my business, along that line. So I said, "Well, now we'll just go down and talk to Mr. Gerlach about it."

And so she jumped up from the machine and she holiered and said, "Come on, Delila." And I said—I don't remember whether I said at that time to Delila that this is not a grievance, this doesn't concern her and she had better stay on her work station.

Q. Now, did Delila Mulford ask you for permission to [168] leave her work station? A. Oh, no. No, no. No.

Q. All right. A. No. No.

Q. What happened next? A. Well, then we went downstairs. And all of this what's been testifed to.

Q. Well— A. And so I don't— I went back on the floor. And from then on I don't know just too much that took place.

Q. When you went downstairs who was with you? A. Well, I think Delila and Catherine.

Q. I see. A. Delila and Catherine.

Q. And who did you all talk to? Do you recall? A. We wanted to talk with Catherine and see what's wrong, what was disturbing her.

Q. I mean who else besides yourself and these two ladies were present downstairs? A. Mr. Gerlach was in the office and our office girl, Miss Stephens.

Q. Now, do you remember at this time any conversation that took place down there? A. Not a whole lot, no. There wasn't much conversation took place. Because she wouldn't go in and talk. She wouldn't go in and talk with Mr. Gerlach.

[169] Q. And who is the she you are talking about? A. Catherine King. I'm sorry. Catherine King.

Q. Yes. I see. Was a request made— A. So I left them arguing and went on back to work. I had to go back on the floor.

Q. Was a request made by anybody for a discussion with anybody else there in your presence that afternoon? A. No. None that I really know of. Not as I recall. No.

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[170] Q. (By Mr. Jenkins) Do you recall, at any other time that afternoon, any discussion that you had with Delila Mulford on the subject matter of the company rule? A. I'll let Delila's—I'll let that stand. Because I paid strict attention. And I know that I was in and out—

Trial Examiner: No. Did you discuss with Delila the company rule that day after the disturbance? That's the question.

The Witness: Oh, that's the question? I don't think so. I don't think so. I think I just told her, I believe I stated, I said, "Delila, this doesn't concern you." I might have said at that time, "This doesn't concern you." Because, you see, it wasn't a grievance.

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[171] Q. (By Mr. Jenkins) Mrs. Gerlach, directing your attention to October 10, 1969, the day of this trouble with Mrs. King that you testified about here, the General Counsel in this case is charging that on this day you threatened to take reprisals against some employee because of her activities on behalf of the union. Did you threaten any employee that day to your knowledge? A. No, sir. That's just a little bit below my dignity.

Q. Well, did you make any threats against Delila Mulford that day? A. No.

[172] Trial Examiner: No. I don't think that was the threat. According to General Counsel it was this last witness. What's her name? Mrs. Hoschar. That's what my notes show.

Well, I may be wrong. Go ahead. It doesn't matter who the employee was. Did you make any threats at all?

The Witness: Who it was? No threat.

Trial Examiner: All right. Let's leave it that way, Mr. Jenkins. Because my notes apparently disagree with yours.

So as to place this I am going to ask the witness whether she made any threats at all to any employee?

The Witness: Now, may I say something?

Trial Examiner: No. You just answer Mr. Jenkins questions.

The Witness: Okay.

Q. (By Mr. Jenkins) Well, on that October 10, 1969 do you actually recall having any conversation at all with Alice Hoschar that day? Was she involved in this problem at all? A. No. I never had any—As far as I know Alice Hoschar was out of the picture at that time.

Q. Yes. A. No.

Q. When you got downstairs with Delila Mulford and this Catherine King, would you state, did you report to Mr. Gerlach that Delila had left the floor without permission? A. Yes. Yes.

[173] Q. And did he make any response back to her after you had told him this? A. As I recall he told Delila to go back to her machine, that he was going to talk to Catherine a little bit.

Q. Yes. And he told her this after you had told him that she had left the floor? A. Yes.

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[174] Cross Examination

Q. (By Mr. Gravitt) Now, Mrs. Gerlach, I understand that you are the production manager? A. That's right.

Q. And that's quite a hectic problem keeping the production going at all times, isn't that right? A. You're not kidding.

Q. And then you have how many girls working under your supervision? A. I think it was stated at about sixty.

Q. And do you remember Catherine King working there before you worked for the company? A. Before I worked with the company?

Q. Yes. A. For the company. Not before—

Q. Before you became production manager. I'll put it [175] that way. A. Well, I wouldn't hardly know how to answer that. Because, you see, I worked—

Q. Yes. That's all right. I withdraw the question. A. And then I quit and I worked again. And she was there both times.

Q. And in order to keep your production going you have got to keep the girls working unless they have good reason to leave the machine? A. Yes. Yes.

Q. That is your job to see that they stay there, isn't that right? A. Yes. That's right.

Q. All right. A. Yes.

Q. Now, King usually made production, did she not? A. Yes, sir.

Q. But even though she had a radio going there and it was disturbing to you she still made production? A. It wasn't disturbing me.

Q. It didn't bother you? A. No, it didn't bother me. Because I wasn't around enough to hear it. Now she was disturbing the other girls around her.

Q. But you did correct her about this matter? A. Oh, yes.

[176] Q. Did you not? A. Yes, indeed. Yes.

Q. Beg pardon? A. Yes, indeed.

Q. And you wanted to straighten that out? A. Yes, indeed.

Q. And you spoke to her about her working conditions. And then it wasn't long after that, I believe it was on October 10th that you said you had the next run-in with King, is that right? A. I suppose it was.

Q. Well, just using your words. A. Well, I suppose it was. But I can't just recall all of these dates. Because—

Q. Yes. A. But—

Q. That was the 10th? A. Yes. All of this—

Trial Examiner: I want to protect the witness. She didn't say October 10th. It was suggested to her—

The Witness: Yes.

Trial Examiner: —that it was October 10th because we were all in agreement that a certain event occurred on that day. I forget now what that event was.

Mr. Gravitt: I'll get it in. I'll straighten it out.

[177] Trial Examiner: I'm not going to—

The Witness: I remember the day.

Q. (By Mr. Gravitt) That was the day that Mulford, you know, the chair lady had taken King and some other girls down to talk to your husband about the piece rates and things? A. Yes.

Q. Now, wasn't it? A. Yes, I think so.

Q. And that was October the 10th, right? A. (Nodded).

Q. What's your answer? A. If they say that's it it was.

Q. I want to know what you say it is. A. Well, I can't recall the date.

Q. But this is— A. I can't recall the date because I just don't exactly remember the date.

Q. All right. You don't recall the date. A. Whatever they said here, that's the way it was. I mean—

Trial Examiner: She has identified the day.

The Witness: Yes.

Trial Examiner: Now, whether that was October the 10th or not is another matter and something she doesn't know.

[178] So why push her?

Q. (By Mr. Gravitt) You know real well the day I am referring to? A. I know real well the day you are referring to.

Q. That was the date that Mulford went down with those girls? A. Yes.

Q. Now, later that day, that's when you had your run-in with King, right? A. About the radio?

Q. No. Not that one. The next run-in. A. Oh, yes. Yes. That's right.

Q. You keep me straight on this. A. Yeah. That's right.

Q. That's true, isn't it? A. (Nodded).

Q. All right. And she was making gestures there that you felt she shouldn't be making? A. Absolutely.

Q. It was relating to her working conditions, so to speak? A. Yes.

Q. And you wanted to get this thing straightened out so you're going to send her to the office now, isn't that right? A. No. That's not right.

[179] Q. Did you tell her to go to the office? A. But not for that reason.

Q. Did you tell her to go to the office? A. I did.

Q. She sassed you? A. She sassed me first.

Q. And you wanted— A. And she told me to tend to my business.

Q. Yes. And you— A. And I said, "I am tending to my business." And she sassed me.

Q. And you wanted to straighten that out?

Mr. Jenkins: Just a minute. Let her finish her answer.

The Witness: And I said, "I am tending to my business." So we'd go down to the office and talk it over.

Q. (By Mr. Gravitt) You wanted to get this sassing problem straightened out, didn't you? A. I wanted to find out what this was all about.

Q. And you were going to go down to your husband so he— A. That's where I was going to go. I'm supposed to. He's my boss.

Q. Yes. And you were going to send King down there, [180] were you not? A. I was making sure. I was going to take her with me down to the office.

Q. You wanted him to correct her, didn't you? A. No, sir. I wanted to take her down because she sassed me.

Q. You wanted your husband to correct King for this sassing you? A. Yes.

Q. And interferring with production? Is that your testimony? A. She was interferring. Not by sassing me. I don't care what they say to me.

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[181] Q. (By Mr. Gravitt) Now, Mrs. King sassed you and you wanted to take her down to the office or told her to go to the office so your husband could straighten it out? A. I didn't tell her. I said, "Let's go to the office and talk this over."

Q. Talk it over? A. Uh-huh.

Q. All right. Then about that time she said, "Come on, Delila, I want you to go with me"? Now, isn't that right? A. She didn't say—I don't think she said, "Come on and go with me." She said, "Come on Delila."

Q. Come on Delila? A Come on Delila.

Q. And you don't know what you said to Delila at this [182] time, do you? A. I don't. I can't recall whether I said—

Q. In fact, you gave a statement saying you can't recall, didn't you?

Mr. Jenkins: Just a minute. Let her finish.

Trial Examiner: Let the witness finish.

The Witness: I don't recall whether I said anything to her at that time upstairs or waited until we got downstairs. I don't recall. I don't intend to story to you.

Mr. Gravitt: Oh, I—

The Witness: I don't recall whether I said anything to her right at that time or not. I don't remember what she said. Whatever she said was probably the truth.

Q. (By Mr. Gravitt) Well, do you deny that you told Delila right there in front of King to not leave the work station then? You don't deny it? A. I don't deny it. I don't deny it at that time, no. I don't know whether I said it at that time or not.

Q. You didn't tell her? A. But they know as a rule that you weren't supposed to leave.

Trial Examiner: Never mind what they know. The question was did you tell her that.

The Witness: I can't remember. I don't know.

Trial Examiner: All right. That's the answer.

[183] The Witness: I don't know what I told her.

Q. (By Mr. Gravitt) You don't think you did? A. I don't remember.

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[184] Q. (By Mr. Gravitt) Now, when you got downstairs there was Delila tagging along here with King, isn't that correct? A. Yeah.

Q. And did you tell King on this occasion that your husband wanted to talk to her but without Mulford? A. I didn't tell her that, no.

Q. Did your husband tell her that in your presence? A. I took them to the office and turned them over to him.

Q. Yes. A. And then I went back upstairs.

Q. Well, did you hear your husband tell Mulford to get on back upstairs, that this is none of her business? A. I don't recall that.

Q. You don't deny hearing that? A. I don't—I don't—I don't recall.

Q. And wasn't it at that time that Mulford went back upstairs and went to work? Just think about it carefully. A. I can't remember whether she went back up there that afternoon. I don't think she went up, went back without King.

Q. Did King go back with her then? A. No.

Q. Did Mulford go back to work? A. I, I don't—I believe she did that afternoon.

Q. Mulford went back to work? A. Yes.

Q. That was after your husband told her it was none of her business A. I don't recall what he said to her.

Q. Did you hear him say anything to her? A. I heard him ask them what it was all about.

Q. And what did they tell him? A. And I didn't hear what they said. I told you I went on back upstairs. I didn't stay for the conversation.

Q. Well, now didn't you stay down there with your husband until, or didn't you tell him what this thing was about? A. Well, yes, I told him what it was about.

Q. What did you tell him? A. I told him just what had happened.

[186] Q. And then what did he say? A. Well, he said—I don't recall just exactly what he said. Because I didn't pay too much attention to it.

Q. And it was at about that time that your husband told Mulford that he didn't have any business with her? A. Yes. I remember him telling her that.

Q. You remember that now? A. And it wasn't a grievance and he didn't have any business with her.

Q. You heard him tell her that? A. Yes.

Trial Examiner: Wait.

Mr. Jenkins: Just a minute. Let him—

Trial Examiner: Wait a minute. Now, you are not going to fragmentize this. She has the right to give the entire conversation. Now, if he said this isn't a grievance, whether it is or not, she has the right to say it.

Did your husband say that?

The Witness: Yes. It is no grievance.

Trial Examiner: All right. I'll take that answer.

Q. (By Mr. Gravitt) Do you have anything else to say? I don't want you— A. No, I don't have anything else to say. But Catherine King had been in the office time and time and time again. And he wanted to talk to her a little bit and that was just it.

[187] Q. Have you finished your answer? A. Yes.

Q. I don't want to cut you off. If you have any more to say you go on and say it.

Mr. Jenkins: We'll protect you.

Q. (By Mr. Gravitt) But your husband told Mulford that he wanted to talk to King without her being present,

right? A. He told her that didn't concern her.

Q. Didn't concern her? A. For her to go on back to her work station. We had orders to get out.

Q. And even in cases where girls leave the floor during working time if they've got a good reason it's all right, isn't it? A. Sickness or family calls or some real sick. Real sick or something like that.

Q. Some good reason? A. Yes. Some good reason.

Q. That had been the practice there up until these people were fired, isn't that right? A. Fired?

Q. Or left the employment? A. Who was fired?

Q. Excuse me. That had been the practice, had it not? A. A real legitimate reason, but nothing petty. No petty stuff.

[188] Q. It just wasn't an iron-clad rule that any time you automatically leave your machine during working hours you can't work here any more? That wasn't the rule, was it? A. No.

Q. In fact, Mrs. Holland and some of the other chair people had processed grievances there in work time, hadn't they? A. Yes. In a very business-like way.

Q. Yes. But they had done it on work time, isn't that right? A. Well, they were grievances. Yes, grievances.

Q. Yes. A. This was no grievance. There had never been any signed grievance.

Q. And Holland or any of the others that processed those grievances on work time, they weren't laid off or suspended or discharged, were they? A. No.

Q. You knew that Mulford was representing the union, did you not? A. No. No, I didn't.

Q. You didn't know that? A. No. I hadn't been informed.

Q. You didn't know anything about that? A. No. We hadn't been informed of that.

[189] Q. You just thought she was another employee working there and not in the capacity of a chair lady? A. That's right.

Q. Now, that's your story? A. That's my story. I hadn't been informed that she was chair lady. I—

Q. Well, was she sort of a union agitator, so to speak? A. No, I wouldn't say that.

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[190] Q. (By Mr. Gravitt) Do you recall making a statement that Mulford led other employees in the office to discuss working conditions with your husband? A. She did that day.

Q. Beg pardon? A. She did that day.

Q. Had she done it earlier? A. She did that just that one time.

Q. That was that— A. That was that day.

Q. The day that she sassed you? A. Yes.

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[191] Q. (By Mr. Gravitt) Now, the question is that you saw yourself Mulford talking to employees and getting them to go into the office to discuss working conditions with your husband? A. No, I didn't say that.

Q. No. I asked did you ever observe that? A. No.

Q. Did you ever see her talking to employees to get them— [192] A. No.

Q. Did you ever hear her tell any employee, come on, let's go to the office— A. No.

Q. —and get this straightened out? A. No.

Q. Never did? A. No.

Q. Did you ever see her leading other employees into the office? A. She did that day.

Q. Oh, that day? A. Uh-huh.

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[193] Q. (By Mr. Gravitt) That was the day King sassed you, not Mulford? A. No. That's right.

Q. Is that right? I apologize. A. Yes.

Q. Do you recall how many employees on this occasion that you just talked to me about that Mulford got to go into the office with your husband? A. Yes. I mean now—

Q. Can you name the girls? A. Yes.

Q. Who were they that went in with Mulford? A. Mary Choquette, Reba Keefer. Those girls that was on skirt piecing. I just can't recall without checking back. And Catherine King.

Q. Choquette? A. Choquette. Right.

Q. And that was a discussion concerning piece rate? A. Yes.

Q. That's right? A. Yes.

Q. Now, when you observed Mulford getting these people in the office, as far as time was concerned that was before Catherine [194] King had sassed you, is that right? A. Yes. Yes.

Q. So then you knew that Mulford was representing the union, did you not? A. No.

Q. You didn't know and still didn't know it? A. No.

Q. Don't know it to this day? A. No. No. I haven't been advised.

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Q. (By Mr. Gravitt) Now, you remember when your hus- [196] band told Mulford to go back upstairs and get to work? A. It was that afternoon that—

Q. Yes. That— A. Yes.

Q. That is when you had taken King down to the office? A. Yes.

Q. And you recall Mulford saying that she had a right to be there to represent King, King had requested— A. Yes. She said she wasn't leaving her.

Q. She objected to going back to work, didn't she? A. Yes.

Q. But then she did go on back to work? A. Yes.

Q. Now, you never had any rule posted at that plant, did you, about they couldn't leave their work station? A. I don't recall. I don't know if there was any posted or not. But as a general rule. Every place has to have rules.

Q. Why certainly, ma'am. But you didn't have any rule posted like that, did you? A. I guess there wasn't any posted.

Q. You let the girls leave their work station for good cause?

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CROSS EXAMINATION

Q. (By Mr. Rubenstein) Mrs. Gerlach, you had stated on cross examination that you had had experience with the union prior to the organization in 1969. Can you tell us the last time that there was a union in your shop? A. I couldn't give you the exact date. It's been quite awhile.

Q. Well, if I call your attention to the date of 1953 does [198] that ring a bell? Would that be about right? A. I would say that would be about the time.

Q. Right. But since 1953 you have not had a union in the plant? A. No.

Q. Now, you said, again in answer to a question, that there had been no objection on the part of the union to the rule that required people to stay at their station unless they asked either you or Mrs. Rice permission. Between April and October of 1959 was that rule ever communicated to the union? Did you tell the union? Or to your knowledge was the union told that there was such a rule? A. I didn't quite understand now the way you put that.

Q. Well, you have testified—

Trial Examiner: Don't make it a long question. Let's see if I can help you. Did you ever tell the union about this rule that nobody could leave?

The Witness: Oh, no, no.

Mr. Jenkins: I object unless it is made clear who the union is.

The Witness: No.

Mr. Jenkins: Are you talking about the business agent?

Trial Examiner: All right. All right.

Q. (By Mr. Rubenstein) All right. me start, do you [199] know Mrs. Wiley, the business agent? A. Yes.

Q. Was that rule ever communicated to her? A. Not through me.

Q. All right. Do you know, of your own personal knowledge whether anybody, either your husband or anybody else— A. These things had been discussed with the union agents in the—

Q. In your presence? A. Yes.

Q. All right. A. They had been discussed about how to handle grievances and so on and so forth.

Q. All right. A. Those thing have been discussed.

Q. Let's go back. When did these discussions take place? A. Oh, I don't remember. Along about this time all this was happening. I can't remember dates.

Q. Are you—Well, was this prior to April of 1969? You will recall that you had a strike in April of 1969? A. Yes.

Q. Leading up to the contract. Was it before the strike or after the strike? A. What do you mean? What was before?

Q. When this was discussed about how grievances would [200] be handled. A. Oh, after the union came in those things were discussed; how to handle grievances and so on.

Trial Examiner: Let's leave out grievances and get right to the rule. That is what I'm interested in.

Mr. Rubenstein: Yes.

Q. (By Mr. Rubenstein) Now, now my question was that do you know of your own personal knowledge whether the rule about people leaving work and having to ask permission of you or Mrs. Rice was ever communicated to the union? That rule. And I am now talking between April and October, 1969 or prior to April of '69. A. That has always been the rule there.

Q. Well, that was not my question, Mrs. Gerlach. My question was did you ever have any, you personally or in your presence, was there any discussion of this rule with the union? A. The only thing that was ever discussed in my

presence, after the union came in we sat down and tried to talk these things over and tried to agree how they would be handled. That's the only thing.

Trial Examiner: I am going to interpret her answer as no. Go on from there.

Mr. Rubenstein: All right. Thank you.

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Q. (By Mr. Rubenstein) Mrs. Gerlach, this rule, how, to your knowledge, and when, if you could tell us, was this rule communicated to the employees? Tell us how the employees were made aware of this rule. A. I wouldn't know how to tell you.

Q. Well, let me start. Would you say personally—

Trial Examiner: She said it wasn't personally. Now ask her if there was any other way.

Mr. Rubenstein: Well, that's right. That's what I'm trying to get out.

Q. (By Mr. Rubenstein) Did you personally ever have occasions to talk to employees about this rule? You personally? A. A lot of times they would ask to be off or leave or something like that. And we'd talk the situation over and find out if it was really necessary or something like that. And I always try to go along with them as much as we can.

Q. All right.

Trial Examiner: I am going to interprete that, even [202] though I haven't decided the case—

Mr. Rubenstein: Yes.

Trial Examiner: —as evidence of the fact that the employees knew about it. Because if they didn't know about it they wouldn't ask her to take leave.

Mr. Rubenstein: Oh, well—

Trial Examiner: Now, you argue about that or develop this further with the witness.

Trial Examiner: Go ahead.

Q. (By Mr. Rubenstein) When these employees would ask you to leave—Give us an example, some examples of

the type of what you meant. Aren't you talking about leaving the plant? Such as for a doctor's appointment or—A. Yes. Yes.

Q. That's what you are talking about? A. Leaving their work station.

Q. Now, are you talking about—All right. For example, do employees who have to go to the ladies' room come to you? A. Oh, no. No.

Q. The do not? A. No, no. No. That would be terrible.

Q. Now, what type of leaving the station does this rule [203] encompass? Does it mean leaving the station for—Is it a time element, for example? That they can leave for a minute or two minutes without asking, but if they have to leave for fifteen minutes then you have to ask. Is this the rule? A. Do you mean to go to the washroom or what do you mean?

Q. Well, what I mean is—What I'm trying to get at is what this rule is. This rule that employees—Apparently you claim that everybody knows about. I am trying to establish, Mrs. Gerlach, what is this rule. When do they have to ask and when don't they have to ask?

Trial Examiner: I would like to interrupt.

Mr. Rubenstein: Yes.

Trial Examiner: Subject to interruption by counsel.

You have breaks at all at work?

The Witness: Yes. We have coffee breaks.

Trial Examiner: Suppose at a time other than at coffee break a girl feels like going to take coffee. Does she have to ask permission?

The Witness: She would have to go. But we have a coffee break.

Trial Examiner: I am not talking about coffee break time. But at some other time other than coffee break time. Suppose somebody just feels like going taking a smoke for ten or fifteen minutes.

The Witness: Then they can't do that.

[204] Trial Examiner: They have to get permission to do that?

The Witness: They have to get permission.

Trial Examiner: All right.

Q. (By Mr. Rubenstein) All right. Are there occasions when an employee can leave the work station, not on break time, without asking permission?

Trial Examiner: This is not on break time?

Mr. Rubenstein: Not on break time.

The Witness: If it was a legitimate reason.

Q. (By Mr. Rubenstein) Then they can go without asking permission? A. Usually they go through—Those things are talked over and if they have to be away they go and talk to their boss about it.

Trial Examiner: Can they do it without talking to their boss?

The Witness: No, they're not supposed to.

Trial Examiner: All right.

Q. (By Mr. Rubenstein) Well, my question is, are there any circumstances—Well, I have already established that going to the bathroom is one circumstance. Are there any other circumstances where an employee can leave the work station without get- [205] ting permission? A. No.

Q. No other reason? A. No.

Q. Except going to the rest room? A. That's right.

Q. And let me ask you this. Have ever been occasions through these years that you have been production manager where employees have left the work station without asking permission— A. None that I—

Q. —and then—Just a moment. And hear me.—and later have come to you and said, given you the reason which you have accepted? A. Not that I recall that. The only time that ever happens is when they're off or didn't show up, you know, come into work on the morning. They always tell us why or something and so forth.

Q. I see. A. But I can't recall anything like that.

Q. Now, as a matter of fact that very morning when the employees went down to handle the grievance concerning the piece rate they didn't ask permission, did they? Mrs. Mulford didn't ask permission then? A. That was at noon hour.

[206] Q. That was at noon hour? A. That was at noon hour.

Q. And none of that was on working time? A. No. That was at noon hour.

Q. And now when were grievances normally handled by Mrs. Holland? A. I don't recall. I didn't have too much to do with that. You see, the office took care of that.

Q. Well, she never asked your permission, did she, when she had to go down handle a grievance if it was during working hours? She never asked your permission? A. No, she never asked my permission.

Q. And she never asked Mrs. Rice's permission? A. No. But she wasn't off the floor too much during work hours.

Q. But occasionally she was? A. Occasionally; if she had a grievance.

Q. If she had a grievance? A. If she had a grievance.

Q. Right. And if she had a grievance and she thought that it was necessary to take it up with downstairs she would take it up downstairs without asking your permission? A. That's right. She usually went at noon hour.

Q. I understand that she usually did. But there were other occasions— A. Well—

[207] Q. —where she went at other times?

Thank you. That's all I have.

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REDIRECT EXAMINATION

Q. (By Mr. Jenkins) Mrs. Gerlach, on cross examination you were handed an affidavit here that you had signed. And I think you had been asked previous to that whether or not you had told Delila Mulford on October the 10th not to

leave her work, you know, before she came downstairs. And I hand you this affidavit and show you the statement in your affidavit beginning at the bottom of the first page and extending through— A. Yes.

Q. Yes. Now, having had that affidavit when did you give that affidavit, do you recall? A. Now, may I tell you—

Q. No. Just what is the date of the affidavit? Here it [208] is right down here at the bottom. A. That's April. That's the 16th of April. It's fresh in my mind.

Q. Now, having used this affidavit that the government used to refresh your recollection, I now ask you whether or not you can say now you did or you did not tell Mrs. Mulford not to leave her work station before she did leave it on October 10th? A. Yes.

Q. Pardon? A. Yes.

Q. What is your best recollection now of what you remember? What do you think you said, if anything? A. I think I said to her that this didn't— Just whatever that says there.

Trial Examiner: That's no good. You'd better testify.

Q. (By Mr. Jenkins) The question is, what, on the subject matter of whether you told her not to leave her work station or not? A. I think I said, "Delila, this doesn't concern you and you'd better stay at your work station."

Q. That's your best recollection now? A. That's my best recollection of what I said.

Q. On October the 10th, when these matters came up in the afternoon with Mrs. King over what you have referred to as her [209] sassing you had she filed any grievance with the company? A. No.

Q. Had she made any complaint? A. Not at that time, no. I didn't consider it a union matter.

Q. She had initiated no complaint or grievance, formal or informal, had she? A. No.

Q. At that time had she? A. No.

Q. Now, do you remember any specific occasion now during her working time when Virginia Holland left her work

station without first giving permission? A. No, I don't recall such a time. I don't recall it.

Q. Regardless of what the purpose was? A. That's right.

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Lawrence Gerlach, Jr.

was called as a witness by and on behalf of the Respondent and [211] after being first duly sworn, was examined and testified as follows:

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DIRECT EXAMINATION

Q. (By Mr. Jenkins) Mr. Gerlach, in the midfall of 1960 through July what was your position with the Quality Manufacturing Company? A. I'm active with my mother and father in the management and operation of the company.

Trial Examiner: According to the complaint you have admitted he is the general manager.

Q. (By Mr. Jenkins) Do you have that title? A. Self-assessed.

Q. Do you have the title? A. I—

Q. Well, what is your title? A. I guess you would say general manager.

[212] Q. What generally are your duties? A. My duties are to work with the contractor, soliciting and getting business for the company, working with the account, doing the shipping, supervising the shipping, and making transportation arrangements and the various details concerning meeting the ads and the responsibilities of the company.

Q. Do you have any duties relative to the women that are the production workers in the company? A. I have been trying to act as company representative working with the union.

Q. For example, did you participate in the negotiation of the contract which is dated April 15th? A. Yes, sir, I did.

Q. 1969? A. Yes, sir.

Q. And have you, in connection with your various duties do you have meetings with business agents of the union? A. I see them nearly every time they're in.

Q. Do they call on you when they come? A. Usually. I might—

Q. You're— A. I might qualify that a little bit. The last gentleman don't seem to stop in my office as often as Elizabeth and Joel and the others did.

Q. Joel Goolst, the witness who testified early this morn-
[213] ing? A. Right.

Q. And Elizabeth Wiley? A. Yes.

Q. You did meet with them periodically? A. Yes.

Q. And have you had meetings, for example, during 1970 with these people or other business agents in the union? A. Yes.

Q. Periodically? A. Yes. Not on any particular schedule, but at pretty regular intervals.

Q. What usually initiates these meetings? What sort of problems?

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Q. (By Mr. Jenkins) Well, then, as I take it, both before and after all of the incidents alleged in this complaint your company has recognized the union, has it not, as the bargaining agent for these people? A. We had a severe strike. When it was over—

Trial Examiner: The question was have you recognized
[214] them?

The Witness: I joined the union. Yes, sir. Joel and I made a speech. We both accepted each other.

Q. (By Mr. Jenkins) This was when? In April of '69? A. April 15, 1969.

Q. And you all have worked together since that time? A. To the degree that we could, yes, sir.

Q. Now, there is a charge here in this complaint that is designated paragraph 13, which says in substance that the company, on October 29th and from then until about November the 10th of 1969 shut down the plant and laid off

employees in order to discourage their membership in the union. Did you ever shut this plant down between October the 29th and November the 10th to discourage anybody's membership in the union? A. To my knowledge that's a fabrication of somebody's mind.

Q. Did you ever shut down the plant during this time to discourage any activity by any of the union or any of its members? A. No, sir.

Q. Relative to this charge in the complaint and after the charge was made did you ever have a conversation with Joel Goolst on this? A. Yes, sir, we did.

[215] Q. Can you tell me about— The charge in this case was filed on March the 15th, I believe, or March 17th. March 17, 1970, referring to a lockout on October 1st. But then the complaint says, which was issued in May, the 25th, refers to an October 29th layoff. Can you fix the date relative to any of those dates time-wise that you had this conversation with this man Goolitch? A. No, sir, I cannot. I have had a lot of conversations with him. But I unfortunately don't keep a diary like he does.

Q. Well, was it before or after these dates? Or do you recall? A. The conversation was the first time that Joel was in after we had become aware of the charge.

Q. I see. All right. Now, who said what on this occasion?

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[220] Q. (By Mr. Jenkins) Now, Mr. Gerlach, relative to the time of the charge of this case, which was March 17, 1970, and the date of the complaint, which is May 25, 1970, can you fix the time of this conversation with Mr. Goolst? A. The first time he was in to see us after the complaint was in our hands and I had knowledge of it. I don't know the date, sir.

Q. Now, on this occasion can you tell the Trial Examiner what you said and what Mr. Goolst said?

Mr. Rubenstein: I would like the record to show that the man's name apparently to whom he is referring is Mr.

Goolst, who previously testified and not Mr. Goolitch. I don't know. He apparently has difficulty with Mr. Goolst's name.

Trial Examiner: I understand. I understood it to be Goolst, even though the pronunciation was different. That is the man you are referring to, isn't it?

Mr. Jenkins: Yes, Your Honor.

Trial Examiner: I am sure the reporter will put it down as G-O-L-L-T-Z.

The Witness: Is it okey, sir, if I answer that?

Trial Examiner: Yes. Please do.

The Witness: I couldn't justify in my mind the reason for that to be on there.

Trial Examiner: Just what you said.

The Witness: And I asked Joel. I asked Joel what was [221] the reason that such a statement was put on there. And he said, also with a gesture, that we give them some and take some. I mean something to that effect.

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Q. (By Mr. Jenkins) Will you tell us what he said that you remember? A. He said it had no merit, that it was injected to give some and take some.

Q. When he said it was injected did he say who did it, who injected it? A. Well, I suppose it was—

Trial Examiner: Just what you remember.

[222] The Witness: —filed by the union.

Trial Examiner: He didn't answer it. Do you recall what he said or not? Not what you suppose.

The Witness: The only people that filed it was the union.

Trial Examiner: No. The question is did he mention any names at that time.

The Witness: Not that I recall, sir.

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Q. (By Mr. Jenkins) How many customers does your company have? A. Sir, we sell at all fifty states. I really don't know that. It's quite a number.

Q. There has been testimony in this case about Mr. Marcus in Cleveland. What is his relationship to the company? A. Mr. Marcus owns Stanley M. Fial Company, which is our principal supplier of work and has been for a great number of years. I assume him to be the owner and principle stock holder.

[224] Q. Do you get orders or business from other companies other than the Stanley M. Fial Company? A. We have in the past. We haven't in the last few years.

Q. Then are you saying that you really have only one customer, this Stanley M. Fial Company? A. For several years, sir.

Q. Now, in October or November of 1969 did any problem develop with respect to your production necessitating any layoff? A. Yes, sir; there did.

Q. Could you explain for the Trial Examiner what it was that happened at that time? A. The principle amount of our merchandise, or our dresses is merchandise through roto ads that appear in the Sunday editions of magazine sections of papers throughout the country. Our principle objective, of course, is to meet the ads, which is the big customers. And there is usually about one in every large town in every state. We usually run—

Trial Examiner: I am not interested in that. The question is what happened to cause you to have a layoff. You can answer that.

The Witness: All right, sir.

Trial Examiner: Was production low or what?

The Witness: No. No.

Mr. Jenkins: Tell us.

The Witness: The styles that we were necessarily supposed to be working on because of these scheduled ads, the piece goods wasn't available to us at that time.

The piece goods were supplied by Mission Valley Mills in New Brownsville, Texas. It's quite a long haul and there's quite a lot of problems concerning freight back and forth.

They sometimes over-extend their sales and for some reason delay delivery.

Q. (By Mr. Jenkins) Let me ask you this, are you telling us that you get cloth from Mission Valley? A. That's right. Mission Valley, New Brownsville, Texas. I think that's the way you pronounce it.

Q. All right. And what occurred important about this, if anything, in the fall of '69? A. The company, the Stanley M. Fial Company, we just mentioned, also started a new procedure of getting markers from a marker specialty house in New York. Now, a marker is a pattern that goes on top of the goods. And naturally they asked the pattern to be made on these styles that was scheduled for the immediate production and immediate sale. And that's the marker we got. And the goods was delayed. And for the reasons I don't really know about, but various reasons, to fit the markers.

[226] We had the plant full of other type piece goods for other styles that were in the line, but the markers were not made for it and were not marketable in our organization.

Q. Now, do I understand in your business that markers are patterns from which you cut dresses? A. Yes, sir; that's correct.

Q. Is it necessary that you have the right patterns for the right goods? A. Very much so.

Q. You can't use any kind of pattern on any kind of goods, is that right? A. Oh, no. The salesmen take the sample lines out far in advance us making the product. And they show people a certain style in a certain pattern and that's what they buy.

Q. Well, what problem developed then in the fall of '69, if any, about the markers and the patterns as they are called and the goods? A. Well, the mill just simply, for some reason, didn't deliver the goods. I assume they over-extended their sales.

Q. Now, what affect did this have then upon your production schedule? A. Well, the affect it had was that we

had markers for one print for goods that we didn't have and we had goods or prints we didn't have markers for. That was the beginning of the fall line.

[227] Q. In wheih case what happens? A. In which case we couldn't make dresses.

Q. I see. So you did what? A. So as the people run out of work on their particular operation they were stair-stepped out and called back in the reverse order.

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[228] Mr. Jenkins: Would you mark this?

(The above-referred to document was marked Respondent's Exhibit No. 1 for identification.)

Q. (By Mr. Jenkins) I hand you here Respondent's Exhibit Number 1 and ask you what that is? A. These are time sheets kept by our secretary of the factory, Katherin Stephens, for the stitch room employees.

Q. Is that the room where the people involved in this case work? A. For the greater majority.

Q. And would you explain what it is, I mean how the record is kept? A. It's a daily record showing the hours people work taken from the time card that's punched.

Q. What period of time does the record cover? A. This record covers October 1, '69 to November 29, '69.

Q. Does it list the names of the employees involved? A. Yes, it does.

Q. And it gives the hours that they worked? A. Yes, sir.

Q. By day each week? A. Yes, sir.

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Q. (By Mr. Jenkins) My question to you is, from the records, and then based upon your knowledge also, what transpired in October and November in connection with the production hours worked as related to this problem of the markers? A. There was a very short condition according to the records when some people didn't work a very short period of time.

Q. What period of time? A. Well, various people at various times. I don't hardly know how to answer that.

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(The above-referred to documents, heretofore marked Respondent's Exhibit No. 1, was received.)

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[233] Q. (By Mr. Jenkins) Now, during this period of time in October and November of 1969, Mr. Gerlach, were any of the production employees laid off when there was work for them to do? A. No, sir.

Q. If it appears from the records— A. I should qualify that.

Q. Yes? Go ahead. A. It may have been there is work for three but not long enough to last the full hours that the union says we should keep them. And then we let one finish up or something like that.

Q. Did you have any antiunion motive with respect to any layoff in October or November, 1969?

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The Witness: Absolutely not.

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[235] Q. (By Mr. Jenkins) Now, during this period of time was at any time this problem of the markers and the problem of the material straightened out or not? A. It will always be a problem.

Q. Pardon? A. There will always be problems. There's problems right now.

Q. Well—

Mr. Rubenstein: I presume then the answer is no.

Trial Examiner: The answer is no. All right.

Q. (By Mr. Jenkins) Well, what happened that enabled you to call these people back to work then? A. We received the piece goods. I received markers for the print we had in the plant.

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Q. (By Mr. Jenkins) Now, have there been other layoffs prior to this when you did not have the right match of markers and materials ? A. Yes, sir. About every season there's a mess. You know, getting started in them.

[236] Q. You characterize it as a mess? A. That's just one of those things. You don't get together. And start our new line, you know.

Q. And then has there been layoffs previous to this for this reason? A. Previous and subsequently.

Q. And there have been since this time? A. Yes, sir.

Q. Can you recall the last time, for example, that there was a layoff for this very reason? A. Yesterday.

Q. When? A. In our finishing room.

Q. When approximately? A. Yesterday, sir.

Q. Yesterday? A. Yes, sir.

Q. There was a layoff? A. Yes, sir.

Q. Just previous to that when did you have a layoff for this very same reason? A. Probably a week— Well, a week before vacation or something like that.

Q. When was vacation? A. Vacation week was the week [237] from August the— Some of the girls will have to tell me. I think this was the first back after vacation.

Q. So immediately prior to that? A. Yes, sir.

Q. And were there other layoffs in the spring of this year? A. Yes.

Q. For this very reason? A. Yes, sir; in certain departments of the plant.

Q. Were any of these layoffs in the same department that involves the people in this case? A. In certain classes. In other words, if we have a style that catches up on the darts, if we don't have anything out those girls will go home. But there will oftentimes be work for people that produce the things further on down the line.

Q. Do these layoffs create any particular problems from the company's point of view? A. Naturally you would rather be rolling full-tilt at all times, but they are an accepted fact in the business. I think it's universal.

Q. You mean other companies have exactly the same problems? A. I feel they do.

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Q. (By Mr. Jenkins) Did you ever make any statement to Mr. Goolst, either on December the 3rd or any other time, on the subject matter of whether or not these three ladies were eligible to return to work at the plant? A. I made statements to him.

Q. And what was your statement? A. The statements was we always need operators and two out of three of them was real good and anytime they would obey the same rules as the rest of them they had their job. And I also further stated that my father wanted a letter though from him to that effect.

Q. You said two out of the three were good operators. And you said— Who was it that could have their jobs any time? A. Either one of the three of them. I said, "We always need operators and two out of the three of them are tops."

Q. And you were referring to all three of them as being—
[241] A. Yes.

Q. —as being eligible? A. Yes, sir.

Q. Did you ever make a statement to Mr. Goolst about December the 3rd, or any other time, that the employees would not be reinstated, they would be hard to live with? Did you ever make that statement? A. Not that I recall, sir. Our position has always been if they would obey the rules they would have their jobs; the same rules as the rest of the girls.

Q. Mr. Goolst testified in a conversation he said occurred with you about December the 3rd that you made some comments on the subject matter of whether or not you wanted a union or not. Do you recall any such conversation on that general subject matter? A. Joel and I have friendly bantered each other about things like that. Even—

Q. Well— A. Even over lunch.

Q. You mean you are social friends as well as business friends? A. We have been at times.

Q. You eat together? A. We have once.

Q. Do you recall making any serious statement then to
[242] him— A. No.

Q. —relative to the union? A. Nothing other than horseplay.

Q. Was this— A. I mean he would say to the effect, hell, if I were in your position I wouldn't want a union either or my dad runs a shop or just horseplay.

Q. You say after the contract was signed you gave a speech welcoming the union in? A. Yes, sir; I joined them. I did my very best to do what I was instructed by them.

Mr. Rubenstein: Mr. Examiner, are we going to— At the beginning of our case, the Board's case, we attempted to put in some of the background, which frankly we thought was relevant.

Trial Examiner: Do you object to that question?

Mr. Rubenstein: Well, I object to the whole line of questioning. They have gone back to April. Merely on the ground that when we tried to put in the antiunion animus—

Trial Examiner: I will sustain the objection on the ground that what he did in April, or what he said before in favor of the union is not admissable. The question is did he say anything indicating antiunion animus on December 3rd. He denies it.

Mr. Rubenstein: That's the question.

[243] Trial Examiner: I'll deny that. I'll allow it, but the other part I will exclude.

This is the same as a civil case. And the fact that a party has been free from contributory negligence a thousand times is not admissable to show he is free at this time.

Mr. Rubenstein: I would also like to show, of course, the first witness, Mr. Goolst, had attempted to go into some background to show the purpose of this. The purpose of this was to show antiunion animus. And the Examiner said that he was not interested in that testimony either. So that is what we are not combating or sort of attempting

to combat, this matter which you now have permitted to go in.

Trial Examiner: I have excluded it. Let's go on.

Q. (By Mr. Jenkins) There was testimony by Mr. Goolst at this alleged December 3rd meeting to the effect that your father let King go, that this statement was made by you to Mr. Goolst, that your father let King go. Did you make any such statement at any time? A. Absolutely not. I've always said—

Trial Examiner: Then the answer is no. Let's not have any speeches.

Q. (By Mr. Jenkins) What did you say on that subject matter?

Mr. Rubenstein: When?

Trial Examiner: This is December 3rd, gentlemen.

[244] Mr. Rubenstein: Is it still December 3rd?

Trial Examiner: I assume so. If I am wrong correct me, Mr. Jenkins.

The Witness: Every statement I've made concerning it is that they abandoned their employment by their own action.

Q. (By Mr. Jenkins) Now, Mr. Goolst testified relative to an alleged conversation with you on November 19, 1969, on the general subject matter that before these girls would come back the plant would be closed down. Did you ever have any such conversation with Mr. Goolst and, if so, tell us what it was? A. Mr. Goolst—

Trial Examiner: The question is did you make such a statement.

The Witness: It is hard for me to understand when he is serious and when he's not serious.

Trial Examiner: Did you make a statement?

The Witness: In a serious statement, no.

Q. (By Mr. Jenkins) Have you ever had any conversation on this general subject matter with Mr. Goolst? A. I'm sure we have.

Q. Can you tell when and where and what the circumstances were? A. It's the— No. I don't keep a diary like [245] they do. But he nearly always came to my office.

Q. Yes. Well, do you remember any conversation at all on this subject matter? A. All the conversation we ever had was to the effect that they would have to, in order to come back, to obey the rules. And my father requested a letter saying they would. Joel assured me that they would come back and obey the rules, but he didn't come up with the letter.

Mr. Gravitt: With the what?

The Witness: He sad he could personally guarantee they'd obey the rules. Right?

Trial Examiner: With the letter.

Q. (By Mr. Jenkins) Well, what isn't clear to me, Mr. Gerlach, is whether or not there was any conversation that you can now recall with Mr. Goolst on the subject matter that you were going to close the plant down? A. To my knowledge Joel and I never discussed that. Because it was never a subject.

Q. Did you ever discuss it in a joking manner that you can recall? A. I'm sure we may have. Because we bat each other. Joel knows my health condition. I mean that's one reason he says these things I'm sure.

Q. Now—

[246] Trial Examiner: Just a moment, please. Not off the record.

Q. (By Mr. Jenkins) There was testimony by Mr. Goolst that he had a conversation with you about January the 12th of 1970 wherein he characterized that the company position had changed on this business of these three women. Do you recall any such conversation as that? A. No, sir. I can't put any of the dates down. I don't have—

Trial Examiner: It doesn't matter on the date. Did you ever say that to him?

The Witness: It may have been the time that we ate down at the Twin-Way Restaurant, where we tried to start talking and we were interrupted there and never got—

Q. (By Mr. Jenkins) Well, did the company ever change it's position? A. No. Not—

Q. Did you ever tell him this? Did you ever tell him that the company had changed it's position? A. No.

Q. Now, what, if anything, do you know relative to a company rule pertaining to under what circumstances employees may leave their work stations during working hours? A. The [247] rule has been in existence ever since I've been in the plant that nobody leaves the stitching room floor without permission. And I don't know of anybody ever abusing it. I don't know of anybody.

Q. Well, the rules of the plant, are any of the rules in writing? A. There have been in the past and have been posted. I don't think they have been since we've been in the new plant. But they were posted at the old plant.

Q. Was the old plant in a different location? A. Yes, it was.

Q. And what happened to the old plant? A. The old plant burned about three or four years ago.

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Q. (By Mr. Jenkins) Mr. Gerlach, in this complaint the government charges that on January 12, 1970 you threatened to [248] take reprisals against an employee because of her activities on behalf of the union. Now, this is in paragraph 8(c) of the complaint. What can you say about that? A. I don't recall the incident at all. And it must be something out of context.

Q. Do you even know what employee the government might be referring to? A. No, sir, I don't. I can't remember all that stuff. There's too many of them.

Q. Did you ever, at any time, threaten to, on or about January the 12th, take reprisals or make any threats to any employee because that employee was doing something for the union? A. No, sir.

Q. Now, directing your attention to October the 10th of 1969 were you present in the plant that day? A. Yes, sir; I was.

Q. Do you remember any incident at the plant pertaining to a piece work matter? A. Yes, sir; I do.

Q. Would you tell the Examiner what took place according to your memory?

Trial Examiner: Well, I am going to rule—I don't want to go into the merits of that. Just the fact that they spoke to him about piece work and then what happened after that. Don't go into what they said about piece work. But was there a talk about piece work? A. Yes, sir.

Trial Examiner: All right. Then go on from there, Mr. Jenkins.

Q. (By Mr. Jenkins) Can you fix the approximate time of the day? A. During lunch period.

Q. And then were you present in the plant on the afternoon during that day? A. Yes, sir.

Q. And do you recall any incidents pertaining to Catherine King? A. I recall the incident from word of mouth. I have no personal knowledge of that incident at all.

Q. Did you talk to Catherine King yourself that afternoon as you recall it? A. No, sir; not as I recall.

Q. Were you present at any meetings or discussion where she was present that afternoon as far as you can recall? A. Not that I recall, sir.

Q. Now, that was on the 10th of October. And on the following Monday, which I believe would be October the 13th, do you recall any discussions with anybody pertaining to Catherin King on that day? A. My father advised me of the events that [250] happened that morning.

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Q. (By Mr. Jenkins) Did you have any conversation that you can recall now the following day on Tuesday or on Wednesday or on Thursday relative to Catherine King and that rule? A. Well, of course on Thursday, that is the day that Martha and I had our confrontation. But I had no personal contact with Catherine King.

Q. What occurred on Thursday then with respect to Cochran?

Trial Examiner: Can I have the date on that, please?

Mr. Jenkins: Yes, sir. I think Thursday would be the 16th of October.

[251] Trial Examiner: All right.

Q. (By Mr. Jenkins) What took place with respect to Cochran on that day? A. I was in my office during noon hour having a conference with my son.

Trial Examiner: What happened? Never mind what conference you had. What happened between you and Cochran? What was said? Get right to the meeting.

The Witness: Martha Cochran came into my office when I was talking with someone else and asked me if I would discuss some grievances. In a very friendly manner I told her that I was going out of town and that I would be back Monday, I would take them up with her then.

I had already told the union about a month before that I had this convention that I was scheduled to at Kansas City, that I wouldn't be available for contact and—

Trial Examiner: Just the conversation, please. What went on between you and Cochran?

The Witness: I—

Trial Examiner: I know it's hard to do, but I've got to confine you, too.

The Witness: Yes, sir. I understand. She insisted that I take those grievances up at that time. And I told her I couldn't until I got back. And from there on she made an emphatic plea that I take them.

[252] Q. (By Mr. Jenkins) What did she say? Can you remember her words? A. I told her I didn't have time to take them up until I came back from that trip. And she said, "By God, you'll take time.", or something to that effect.

Q. And— A. I took that as a figure of speech. I didn't take it as a cuss word. I mean I just—

Q. Then what happened? A. Of course, and I further knew that—

Mr. Rubenstein: Objection.

Trial Examiner: Please just give the conversation. Or if no conversation then what did happen is what Mr. Jenkins wants. What did she do and what did you do? If nothing was said.

The Witness: After giving me the grievances, forcing them on me, she took out to the lunch room. And I went upstairs and pulled her card and came down and said, "Martha, you won't be working this afternoon." And she said, "You're firing me?" or, "Are you firing me?" And I said, "You just won't be working this afternoon. And I went on back to my office. That's the last of my knowledge with it.

Q. (By Mr. Jenkins) Now, did you have any further discussions that afternoon? This is now Thursday, October 16th, [253] that we are talking about. Did you have any further discussions that afternoon with Mrs. Cochran that you can recall now? A. No, sir; I did not.

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Q. (By Mr. Jenkins) Do you know Delila Mulford? A. Yes, sir.

Q. Have you ever cursed her? A. Not in the context of a cuss word. I may have used it as a figure of speech in some talk, which I do once in awhile.

Q. Does she use the same kind of language or do you know? A. To my knowledge, not—No.

Q. Do you ever recall any conversation with Delila Mulford on the subject of a plant closing on December the 1st? A. No, sir; I do not.

Q. Did the plant close December 1st? A. No, sir; It did not.

Q. There has been evidence in this case, I believe, that [254] the union filed a grievance over these three women. That's correct, isn't it? A. Yes.

Q. On the incidents that occurred in October? A. Yes.

Q. And they are the same subject matter of this proceeding here, right? A. Yes.

Q. And an arbitrator was appointed to hear that, was he not? A. Yes, sir.

Q. That matter is still pending? A. I don't know what the disposition has been.

Mr. Rubenstein: The matter is not still pending.

Trial Examiner: I don't care whether it is or not. I'll decide this case on the evidence before me.

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[255] CROSS EXAMINATION

Q. (By Mr. Rubenstein) Mr. Gerlach, you testified concerning a conversation that you had with Mr. Goolst sometime after May 25, 1970. This now being August the 5th could you tell us, be a little more precise as to when that conversation was? A. I think I qualified all of my statements that I don't remember any of the dates.

Q. Well, can you give us an approximate? A. What instance are you referring to, sir?

Q. I am now talking about the time when Mr. Goolst was supposed to have told you that the union really didn't think that this lock out was— A. That was the first time he came in [256] to see us after we had been served with that notice.

Q. The complaint? A. And it had that charge on it.

Q. The first time after the 25th of May? A. That he was in to see me. Yes.

Q. Well, suppose I tell you that he has not been in to see you since May 25th? A. Well, I would have to say that that charge came from somewhere that I saw. Because it was through some kind of correspondence or document or something that charge came up and I discussed it with Joel.

Q. Now, let me see if I can refresh your recollection. The last time—Suppose I tell you that the last time that Mr. Goolst spoke to you—

Mr. Jenkins: I object to this; him telling him.

Trial Examiner: I think that is a proper objection. I'll sustain it.

Mr. Rubenstein: All right.

Q. (By Mr. Rubenstein) Do you recall the time when Mr. Goolst and Angela Bambast, who is the manager of Upper South Department, international vice-president, were here? A. No, sir; I do not. I wasn't present at the plant at the time.

[257] Q. And you don't recall when that was? A. No, sir; I don't. If you want me to clarify I'll clarify it.

Trial Examiner: Mr. Witness, please.

The Witness: Okay.

Trial Examiner: I don't want to get any speeches about it.

The Witness: I just want to give the truth.

Trial Examiner: I don't care. You just answer the questions. You are not here to decide how you answer them, but only to answer yes or no or more fully if the question calls for it.

The Witness: I was just trying to help straighten the record.

Trial Examiner: You are not here to help straighten the record. You are here to answer questions. The lawyers will straigten the record.

Q. (By Mr. Rubenstein) Now, do you recall when Mr. Lowe, the man, the investigator from the Labor Board, was here? A. Yes, sir.

Q. You do recall? A. Middle of April. Yes.

Q. That's right. Now, this conversation with Mr. Goolst, did it take place before or after that, sir? A. Sir, it was the [258] first time after we had a document stating that. Now, that may be where I get that. That may not be from this government thing. It may be in that arbitration thing. But it was our first conversation we had after we had knowledge that that statement had been made.

Q. All right. A. Is that clear?

Q. Now, the paper requesting arbitration, the grievance that was filed, not only on behalf of these three, but on a number of other issues, do you recall that there was a letter requesting arbitration which listed not only the discharge

of the three people here, but the shut down of your plant at this time and some other matters? A. That may be the document we're talking about.

Q. Is that the document you're talking about? A. It's the first knowledge that I had of that statement on some document.

Q. Now, isn't it true that that document was filed in November of 1969? A. I'm not sure of the date, sir.

Q. It was filed at the end of 1969, wasn't it? A. If you say it was and have a document that was that document it was. I mean I don't know. Whenever it was it was.

Q. I see. So that you really, in this conversation with Mr. Goolst, that on direct examination you placed after May 25, 1970, may, in fact, have taken place in November of 1969? [259] A. I want to place it at the first conversation we had after I had a document stating that condition. That is where I'm placing it.

Q. So now that may have been an arbitration proceeding? A. It was on the first document that I received that had that condition listed on it.

Q. And the first document that you had which alleged that there was an illegal lockout, and I think that was the phrase that was used during that time period that is stated in this complaint, was in November of 1969? A. I'm not sure when it was. The document will have the date on it, sir.

Q. And there was, in fact, grievances filed on behalf of these employees on October the 15th, October the 16th, and October the 20th? A. Yes, sir. That's what Martha Cochran brought to me on the Thursday afternoon. Whatever that date is. At noon.

Q. And subsequent to that there were some other grievances that were given to you dated October 16th and October 20th, which were grievances on the actual discharge? A. They— If the 16th is Friday they couldn't have been given to me on the 16th. Because I was in Kansas City.

Q. No. The 16th was—I see. Well, the grievances are dated the 16th? A. Well, they apparently gave them to me

[260] sometime after that because I was in Kansas City on that Friday.

Q. And then you had discussions concerning these grievances, did you not? A. Yes, sir.

Q. Now, in the discussion of the grievances did you make it clear to the union that the girls could come back to work, that they hadn't been fired and that they could just come back to work? A. Yes, sir. It was very clear to them that all they had to do was obey the rules of the company. And my father asked Joel Goolst for a letter of that effect.

Q. Now, what do you mean by obeying the rules of the company? A. They know what they are. Anyone of them you want to put on the witness stand knows the rules of the company.

Q. I see. Now, this is no specific rule. This is just a general proposition that all the rules at the company, that they might have— A. The same rules that the other girls have to obey, abide by. The same rules Alice Hoschar and Virginia Holland abide by and Mary Joe Kitt.

Q. Now, what rule did Mrs. Cochran not abide by? A. Not reporting to work. She was given the afternoon off and she was supposed to go back into work.

Q. Your testimony is she was given the afternoon off? A. Yes, sir. Thursday afternoon.

Q. Right. And why was she given the afternoon off? A. Because of her conduct in bursting into my office when I wasn't available to talk with her.

Q. I see. A. And I assured her I'd talk with her the minute I got back.

Q. Now, the door was not closed, was it? A. I don't recall that, sir.

Q. And, as a matter of fact, did she not want to merely give you these grievances? That was the purpose of her visit? Was to hand you the grievances? A. No. I think she wanted to discuss them. I assumed she did. Most of them discuss them. They don't just hand them to you without any explanation or any discussion.

Q. Well, you testified that Mr. Cochran forced those on you and then left. What did you mean by that? A. I didn't—I wasn't willing to accept them and go into them right then. And she emphatically put them on my desk or something to that effect, sir.

Q. As a matter of fact you just weren't willing to accept them at all? A. Not then, no.

Q. That's right. A. I told her I would Monday.

[262] Q. And you would Monday? A. Yes, sir.

Q. You wouldn't even take these four or five pieces of paper that she had? You just didn't even want to take them? A. No, sir; not then.

Q. All right. A. Because I had plans made. And I had my son there. And I felt like I had an obligation to my son to do some explaining to him. And that's what I did.

Q. And because then she left these papers with you or insisted that you take these papers, that's when you gave her, according to you, the afternoon off? A. Because of her conduct and the way she handled it. Yes, sir.

Q. Right. Did you tell her this? That it is because of your conduct or— What did you tell her when you gave her the afternoon off? A. Because of her conduct and the way she handled it. Yes, sir.

Q. Right. Did you tell her this? That it is because of your conduct or— What did you tell her when you gave her the afternoon off? A. I just went upstairs and pulled her card. And I said, "Martha, you are to take the afternoon off." And she said, "Are you firing me?" I said, "No. You're just to take the afternoon off." And she kept trying to bait me to say she was fired. And I went on back to my office. And that's the last I had. And that's the first confrontation I'd ever had with Martha.

Q. I see. Now, when she didn't show up the next day did you do anything about it? A. It was my understanding that that afternoon she—

[263] Trial Examiner: Wait until he finishes his question. I didn't get the end of the question.

Mr. Rubenstein: I haven't finished the question.

The Witness: I'm sorry.

Q. (By Mr. Rubenstein) When she did not show up the next time or the next day, or the next time that she was scheduled for work did you or did anybody in the company, to your knowledge, contact her and find out why she didn't come back? A. She had told us on the phone that if we wanted her we could call. And we assumed that was the reason.

Q. She had told you on the phone? A. She had told Katherin Stephens, our secretary, about one-thirty that afternoon, Thursday afternoon. She called in and said, "If you want me you'll have to call." That's what the secretary told me, sir.

Q. I see. But you don't know? A. She didn't talk to me.

Q. I see. A. No, sir.

Q. So, therefore, nobody did call her? A. No, sir. Not to my knowledge. I didn't.

Q. To your knowledge nobody called her after that afternoon— A. No.

[264] Q. —when you sent her home? A. No.

Q. All right. Now, back then with the rule apparently that you wanted Mr. Goolst to put in a letter to your father that she wouldn't burst into the office, or what rule did you want him to write in the letter? A. That they would obey the same rules that the other eighty or ninety people were. The same rules that the ones that were working would obey.

Q. And Mr. Goolst said, you said, "Well, of course they would obey."? A. He assured me personally that I could get them to obey the rules. And my father then asked him, he said, "Put it into a letter form."

Q. I see. So you wanted it in a letter? A. My father did.

Q. Your father wanted a letter— A. Yes.

Q. —in which they would agree— A. To obey the same rules that the rest of the people did.

Q. —to obey the same rules as the rest of the people? A. That's right.

Q. Now, what rule did Catherine King violate? A. A request to have a conference with an employer.

[265] Q. Alone? A. Yeah. As she had done thousands of times.

Q. I see. Now, she did not refuse to have any conference with the employer. The request was that she have her steward present? A. To my knowledge that's what her request was. Yes, sir.

Q. And that is a violation of a company rule that an employee— A. No.

Q. —that an employee cannot have any— A. Oh, no.

Q. —that they must meet with them alone? A. No. We contend it is the management's right to have a personal conference with an employee. And if something there is said that is not right they have a grievance procedure to go through.

Q. I see. So that Catherine King then didn't really violate any rule? A. Well, she violated a rule by causing a disturbance on the floor and also by playing a radio.

Q. All right. A. We couldn't allow eighty people to play eighty radios, you see, on eighty different stations.

Q. I see. So the rule that Catherine King had violated was the conduct about which Mrs. Kathryn Gerlach has testified [266] previously that occurred on October the 10th; that is, the playing of the radio and the standing up and waving something and sassing the production manager? These are rules that she violated? A. Any conduct that would take these people—

Trial Examiner: The question is were those—

The Witness: All the production girls—

Mr. Rubenstein: Are those the rules she violated?

The Witness: He's leading me, sir.

Trial Examiner: You just answer the question. If you can't answer it say so. I don't care whether he leads you or not.

The Witness: Read the question back.

Trial Examiner: Repeat your question.

Q. (By Mr. Rubenstein) The question is, is the rule that Mrs. King violated about which you wanted this letter, or your father wanted this letter, is that the conduct about which Mrs. Katheryn Gerlach has previously testified to that occurred on October 10th? A. I don't want to preface somebody's testimony. If you'll ask me the question I'll answer it.

Trial Examiner: I think that's a proper reply.

Mr. Rubenstein: I think so.

Q. (By Mr. Rubenstein) Was the rule that she violated, [267] and about which this letter was supposed to cover, the question of playing the radio and her alleged disturbance of standing up and not doing production and her sassing the production manager? Are these the rules that she violated? A. That would be among them. Yes, sir.

Q. All right. Now, what are the other rules? You said among them. Are there other rules? A. Well, there's rules in the plant that you have to call in when you're off sick. And you ask for permission for dentist and doctor appointments. And that you— My father—

Trial Examiner: I am not interested in the other rules.

The Witness: He asked me.

Trial Examiner: The rules she violated.

Q. (By Mr. Rubenstein) I am talking about the rules that Mrs. King violated. There was a request made—you have testified that there was a request made of the union representative, Mr. Goolst, that before these people could come back there had to be assurance in writing— A. That they would obey the same rules as the others.

Q. —that they would obey the same rules as anybody? A. Right. That's right.

Q. And now I am trying to establish why you felt that this [268] was necessary for these three employees? A. Because we felt like they may not obey those rules.

Q. All right. And what did you— Why did you feel that Mrs. King might not obey those rules? A. Her conduct around the plant in my opinion.

Q. And this is the conduct of the playing of the radio, the sassing of the production manager, the failure to work and so on on October 10th and prior thereto, is that it? A. Yes, sir. (Nodded).

Trial Examiner: Don't shake your head.

The Witness: Yes, sir.

Trial Examiner: And the reason I say that is the reporter can't put that down.

The Witness: I understand.

Q. (By Mr. Rubenstein) And is it for this that—you have stated, I believe, that the reason Mrs. King is no longer, was no longer with the company after October 16th was because she would not go into the office and talk to management without her steward? Isn't that the reason? A. My father wanted to speak with her in a private manner. Yes, sir.

Q. Okay. A. About her conduct.

Q. And that's why she is no longer there? Because she [269] refused to— A. No. The reason she is no longer there is because she abandoned her job. She left the plant and didn't come back to work.

Q. Well, her card had been pulled, had it not? A. We do that on every absent. That's a—

Q. No. Her card— A. In other words another employee might punch an absent girl's card or something, you see. Punch it to foul up the bookkeeper.

Q. Well, she sat there all day waiting for her card, didn't she? She sat there and she waited? A. I don't know what she waited for. You'd have to ask her that.

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[274] Q. (By Mr. Rubenstein) You have stated, I believe, that there are grievance forms and these are the grievance forms that Martha Cochran brought to you that particular day; that is, October 16th? A. No, sir. That is not true.

Q. She didn't bring you grievance forms? A. No. You said these are and I said those are not.

Q. I said grievance forms like these. White copies. A. No, sir.

Q. She did not bring you— A. Not any green ones.

Trial Examiner: Were—

Mr. Rubenstein: I said white copies.

Trial Examiner: Were they in writing?

The Witness: Yes, sir.

Q. (By Mr. Rubenstein) White copies? A. Yes, sir.

Q. Brought you white copies? A. Yes, sir.

[275] Q. Of a grievance? A. Yes, sir.

Q. Is that the usual method in which grievances are processed? A. Yes, sir.

Q. And— A. With the shop steward. Correct.

Q. With the shop steward? A. Yes.

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Q. (By Mr. Rubenstein) Did you talk to— The conversation on the 12th of January, do you recall talking to Mr. Goolst [282] about your conversation with Mrs. Bambast? A. I don't recall any of the details, sir. I've talked with him.

Q. You don't recall any of the details? A. I've talked with him many times.

Q. Do you recall talking to Mr. Goolst about the fact that you had requested him to come down because the company had changed its position? A. No. No. The words company has changed its position is something somebody is asserting. My contact—

Trial Examiner: The question was did you make such a statement.

The Witness: My contact with the union was in trying to settle the thing. And that's all.

Q. (By Mr. Rubenstein) Was trying to settle the thing? And that was the purpose, was it not, of the conversation with Mr. Goolst on January 12th, wasn't it, to settle this

case? A. An attempt to get the girls back to work. Yes, sir.

Q. And had you ever contacted the union prior to January 12th about an attempt to get the girls back to work? A. I've never personally called the union that I recall, other than the one time I tried to get in touch with Joel to see if we could get the girls back to work.

Q. Right. And that is in January— A. I'm not sure.

Q. —of 1970, but you're not sure of the date? A. No, sir.

Q. So that between October, when the girls no longer worked with the company, and on or about or around January the 12th—

Mr. Jenkins: I object to this. The use of the date on this and again he is just trying to—

Trial Examiner: He hasn't finished the question. I believe he is entitled to finish it.

Go ahead.

Mr. Jenkins: All right.

Q. (By Mr. Rubenstein) Did you talk to any representative of the union between the date that the girls were let go and this conversation with Mr. Goolst, regardless of when it occurred, did you have any other conversation with any union representative from the manager to a shop steward? A. If they were in the plant, other than the one time Miss Bambast was there. I recall missing her. But if they were in the plant I'm sure we talked.

Q. Well, that's not my question. My question is do you recall any conversations between the time the girls were let go and this conversation with Mr. Goolst, whenever it might have occurred, about settling the case or letting the girls go?

Mr. Jenkins: I object. It's immaterial.

[284] Mr. Rubenstein: It's not immaterial.

Mr. Jenkins: Conversations relative to trying to settle our case.

Mr. Rubenstein: There were grievances filed.

Trial Examiner: I'll allow it.

The Witness: The question again, sir?

Q (By Mr. Rubenstein) The question is do you recall any conversations between yourself and any union representative from the manager to a shop steward and anybody in between concerning the settlement of this case and having the girls go back to work between the time the girls were no longer working and this conversation of Mr. Goolst? A. I don't recall any conversation in any degree of detail. I have tried to get them back to work.

Q. All right. And was it at this conversation with Mr. Goolst that the question of the letter first came up? A. I'm not sure of the date of that letter. My father may be able—

Q. I didn't say that. I said was it at this conversation. A. I said I'm not sure of the date of that discussion about the letter.

Q. I see. It may have been after that? A. I'm not sure of the date, sir.

[285] Q. All right. A. Joel might give it to you.

Q. Now, as far as you personally are concerned the only one of the, shall we say, separations from employment of the company of the three people; Mrs. King, Mrs. Mulford, and Mrs. Cochran, that you personally had any part of play in was that of Mrs. Cochran? Is that correct? A. That's right. I suspended her for the afternoon and I went to Kansas City. I don't know why she didn't work on Friday. She'll have to answer that.

Q. I see. She already has. But you had nothing to do and have no knowledge of the basis on which Mrs. King or Mrs. Mulford did not— A. Other than conversations with my family.

Q. Yes. A. I have no knowledge.

Q. I understand that you did not make those decisions? A. No, sir. I may have discussed it with my folks, of course.

Q. What did you discuss with your folks? A. We discuss plant business every time we sit down, you know.

Q. Is it your testimony, and again I am not clear, that

you never had any conversations with Joel Goolst concerning plant closings or that you never had any serious conversation? A. Never in a context of doing it. Joel banters me a lot and I [286] banter him.

Q. So that it may have come up in what you though was a kidding manner? A. It's—

Q. Is that it? A. He's of that nature.

Q. I see. And you are, too? A. Yes, I am.

Q. So the conversations about which he testified are you saying may have occurred but in a— A. Out of context.

Q. —in a context different than what you— A. Yes. That's right. That's right. I don't deny that they may not occur.

Q. But— A. But not in that context.

Q. I see. A. I hope I don't have to guard everything I say to Joel from now on.

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Circuit Courtroom
Second Floor
County Courthouse
Point Pleasant, West Virginia
Thursday, August 6, 1970

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[293] **Lawrence R. Gerlach, Jr.**

was recalled to the stand as a witness by and on behalf of the Respondent, and was examined and testified further as follows:

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[308] Q. Well, now why—Would you explain again for the record why the shop did not work, why nobody worked the 3rd, 4th, and 5th of November? A. Yes, sir. We get our piece goods, or we got our particular piece goods that our ad styles were on at that particular time from Mission Valley Mills in New Brownsville, Texas. And they had apparently oversold their production, had some problem in

their production of the material. And, of course, there is quite a bit of transportation involved between here and there. And those being our ad styles and this, of course, being the beginning of the fall line, the parent company or Stanley M. Fial Company, of course, would have the markers [309] made on the ad styles and the advertised numbers. These ectochromes in the back of the magazine sections of newspapers are printed about two months in advance, you see. And you have to meet these dead lines in some way.

Now, naturally they would have the markers made on those ad syles first; although they ordered in goods for all the stock merchandise that sells around the ad merchandise, you see. All the floor merchandise.

Now, the condition was that we didn't get our ad material in fast enough to keep going on that, which is what we had the markers for.

Now, they did change the sy em at that time in getting their markers from a specialty house out of New York. Having the markers premade up there.

And although the plant was full of goods it was goods for the regular stock numbers that we didn't have the patterns for yet to cut. And, of course, that indication there that we went back, or whatever you say it was, the 4th or 5th or 6th, whatever it was, now either one of two things happened. Either they hurried up and got me a new marker for one of the patterns we had in the place, you see, or they flew in some goods to the airport or we got a shipment in some way from Texas.

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[313] Mr. Rubenstein: Mr. Examiner, I move at this point again to reject Respondent's Exhibit Number 1. It apparently does not stand for what the testimony yesterday seemed to indicate that it stood for.

There is no evidence that this is a record kept in the usual course of business. There is no explanation on the part of this witness as to what this exhibit is, why certain names

are on two pieces of paper representing November and they are not on the list of October.

Trial Examiner: Perhaps I was a little hasty yesterday in admitting it. Although I did ask the witness if it was made in the regular course of business. Perhaps I should have given you voir dire. And if I had I would have arrived at a different conclusion. Because I am convinced these are not made in the regular course of business, notwithstanding his conclusionary statement yesterday. So I will sustain your motion. It may go in the rejected exhibit file.

But since they have been thoroughly examined by Mr. Jenkins and you the Board will have the examination. So mark those rejected, Mr. Reporter.

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[344] **Mary Katherin Stephens**

was called as a witness by and on behalf of the Respondent and, after being first duly sworn, was examined and testified as follows:

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DIRECT EXAMINATION

Q. (By Mr. Jenkins) Miss Stephens, what is your position with the Quality Manufacturing Company? A. Secretary.

Q. And how long have you been secretary? A. Since 1937.

Q. Do you keep the records of the company? A. Yes.

Q. I hand you here Respondent's Exhibit Number 1. Do [345] you keep those records? A. Yes, sir.

Q. Is that a summary of the time cards? A. Yes, sir.

Q. What did you prepare that from? A. Payroll book.

Q. When did you prepare it? A. Well, the payroll is every two weeks.

Q. I see. Do you recall exactly when you wrote out these records, if you did? A. No, I don't recall when those were written.

Q. Is it your writing? A. Yes, sir.

Q. Do you have any idea about how long ago it was? A. No. I can't remember when they were done.

Q. Recently? Or you just don't remember at all? A. I just don't recall.

Q. I see. Do you know, do they correctly reflect what the payroll book shows? A. Yes, sir.

Q. I see. Were there any names left off of there that were on the payroll book that you recall? A. Well, I believe the cutting room was left off.

Q. Did they work during this period? A. Yes, I think they did.

[346] Q. I see. Do you know how that occurred? A. No. I just must have overlooked it when I was copying them off.

Q. I see. Who is in the cutting room? A. Hobart DeWees, Jr., Pauletta Greenless—

Q. About how many employees? A. Around six I believe.

Q. I see. They are on one month's records there but they are not on the other, is that it? A. Yes, sir.

Q. Are they all together in the payroll book or on a separate page? A. No. They're at the end. All the machine operators are on alphabetical order.

Q. I see. And the ones that were left off were at the end of the payroll book? A. Yes, sir.

Q. I see. Now, Miss Stephens, I want to direct your attention back to the month of October of 1969. I presume that you know Delila Mulford and Catherine King and Martha Cochran, do you? A. Yes, sir.

Q. Now, directing your attention back to that period of time and then particularly I want to direct your attention to a day, [347] a Friday, October the 10th. Do you recall any incidents that occurred that day involving any of those people and any of the people in the management of the company? A. Yes, sir. Catherine King and Delila Mulford came down to the office.

Q. Do you have any recollection of what part of the day that was in? Or do you remember? A. It was in the afternoon sometime, but I don't remember what time it was.

Q. You saw them come to the office, I take it? A. Yes.

Q. Who was there? A. When they came down?

Q. Yes, ma'am. A. Just Mr. Gerlach.

Q. All right. Did anybody come with them? A. No, I don't believe they did at that time.

Q. I see. Did you see Mr. Gerlach there or not? A. No. I don't believe she came down then.

Q. You didn't see her? A. No, sir.

Q. All right. Now, what took place there, if anything, that you observed or heard? What conversation? A. Well, Mr. Gerlach told—

Trial Examiner: Mr. who?

The Witness: Mr. Gerlach.

[348] Trial Examiner: Yes. Will you speak up, please?

The Witness: All right, sir.

Asked Catherine King to come in, that he wanted to talk to her a couple of minutes.

Mr. Jenkins: Yes.

The Witness: Before she went back upstairs. And Delila was with her. And he asked her what she was doing down—

Mr. Jenkins: Speak up now so that we can hear.

The Witness: He asked Delila what she was doing down there with them and she said she came down with Catherine. And he said that was against the rules, that she wasn't supposed to come off the floor.

Mr. Jenkins: Yes.

The Witness: And she said she would come off any time that she wanted to.

Mr. Jenkins: Yes.

Q. (By Mr. Jenkins) And then what next did you hear? A. Well, he said, "Well, go back upstairs." And he would see what he would do about it. Think it over.

Q. Did he make it clear who was to go back upstairs or one or both or do you have any recollection? A. He said he wanted to talk to Catherine alone.

Q. Yes. Well, after he made this statement about going [349] back upstairs what happened? Did anybody go upstairs? A. Yes. They went back upstairs.

Q. Who? Both of them? A. Both of them.

Q. And do you have any recollection of any conversations like in the following week between these same parties or Mr. Gerlach? Do you remember anything else that happened? A. Yes. They came in on Monday.

Q. And who is this "they"? A. It was Catherine King and Martha Cochran.

Q. All right

Trial Examiner: Catherine King and who?

The Witness: Martha Cochran.

Q. (By Mr. Jenkins) I see. And when you say they came in where is it they— A. They stayed out in the lobby.

Q. Of the plant? A. Yes.

Q. And were you there? A. Yes, sir.

Q. And who else was there? A. Well, I don't recall of anybody else being in the office right at that time.

Q. Was anybody else around? A. No. I don't believe [350] Mrs. Gerlach was there at that time.

Q. All right. Was Mr. Gerlach there? A. Yes, sir.

Q. Do you remember anybody else being there except yourself and Mr. Gerlach and Catherine King and Martha Cochran? A. No.

Q. Just the four of you there? A. Just the four.

Q. What do you remember, if anything, was said at that occasion? A. Well, he asked Catherine King to talk to her a couple of minutes.

Q. Yes? A. And she wouldn't come in. And Martha said no she couldn't come in alone and that she would have to talk with her.

Q. What was said after that? A. So he asked, he offered them their cards—offered Martha her card upstairs.

Q. Yes? . And she refused it. So they stayed in the factory until three o'clock that day.

Q. What is this card you're talking about? A. The time card.

Q. And then you say they did what? A. They stayed at [351] the plant all day up until three o'clock that evening.

Q. This is Cochran and King? A. Yes, sir.

Q. Whereabouts in the plant did they stay? A. They stayed over in the restaurant part.

Q. Stayed over in the restaurant? A. Yes.

Q. I see. Did you overhear any other conversations between them that day and Mr. Gerlach or anyone else? A. No, I never heard any more that day.

Q. All right. Now, go on. Did you hear any other conversation? What happened the next day, if you know? A. Well, they came in the next morning and—

Trial Examiner: Just for my own records is this October the 11th you are talking about now?

Mr. Jenkins: I think so.

Mr. Rubenstein: No. No.

Trial Examiner: Mrs. Stephens has previously told me she was bad on dates. So I haven't asked her specifically.

Mr. Rubenstein: I think it's the 13th. The 10th is a Friday, so the next day would have been a Monday.

Trial Examiner: It doesn't matter. I wanted to know what the next day was.

Mr. Jenkins: Yes. Thank you, Your Honor. I'll see if I can—

[352] Q. (By Mr. Jenkins) This first-day-conversation when you say you remember that Delila Mulford was there, you say? A. Yes.

Q. And Catherine King. Do you have a recollection of what day of the week that was one? A. That was on Friday.

Q. On a Friday? A. Yes, sir.

Q. Now, you have told the Trial Examiner about something that happened on another day, the next event. What day would that have been? A. That was the Monday.

Q. The Monday following? A. Yes, sir.

Q. Well, then if Friday was October the 10th that would be the 13th? A. 13th.

Q. All right. Then you have told us about the 13th. Now, do you have any recollection of what, if anything, occurred the following day between them, which would be the 14th of October, Tuesday? A. Well, Catherine—

Trial Examiner: Just to get my records clear, this con-[353] versation that she heard King and Cochran engage in with Mr. Gerlach was the 13th, is that it?

The Witness: Yes.

Trial Examiner: I want to be sure. Now we're on the 14th. All right. Thank you.

Mr. Jenkins: Tell us.

The Witness: Catherine King and Martha Cochran came in on Tuesday morning.

Mr. Jenkins: Yes. All right.

The Witness: And he asked Catherine to talk to her a couple of minutes.

Mr. Jenkins: Yes.

The Witness: Before she went upstairs.

Mr. Jenkins: Yes.

The Witness: And Martha said no, she couldn't talk to him alone. She'd have to be with them.

Mr. Jenkins: Yes.

The Witnes: So he said, "Well, you'd better take your card and go on upstairs to work."

Q. (By Mr. Jenkins) Yes. Now, who did he say this to? A. To Martha. But she refused to go.

Q. Then what else was said? A. He—

Q. If anything. A. And so they went on out. They went out that day.

[354] Q. They did not stay at the plant that day? A. No, sir.

Q. This is Tuesday, the 14th, I believe, of October. Then do you have any recollection of anything that happened on the subject matter the following day, which would be Wednesday, October the 15th? A. Wednesday.

Q. Yes, ma'am. A. Well, Martha Cochran and Delila and Catherine King came in on Wednesday.

Q. Yes. A. And Mr. Gerlach—Delila Mulford took her card and she went on upstairs to work.

Q. Yes. A. And Mr. Gerlach asked Catherine to talk to her a couple of minutes.

Q. Yes. A. And Martha said, "No, she couldn't." She'd have to be in there with them.

Q. Yes. A. Or she was going to stay with them.

Q. Yes. Thar' you. A So they—

Q. What happened after that on Wednesday, if you remem- [355] ber? A Well, they went home that Wednesday.

Q. All right. Do you remember any conversations or anything that took place the following day, which would be Thursday, the 15th? A. On Thursday?

Q. Yes, ma'am. A. Well—

Mr. Rubenstein: The 16th. Mr. Jenkins, I think it's the 16th.

Mr Jenkins: Yes. Your're right. Thank you.

Mr. Rubenstein: Yes.

The Witness: Martha Cochran and Catherine King and Delila Mulford came in on Thursday.

Mr. Rubenstein: Would she keep up her voice, please?

Trial Examiner: Yes. You will have to talk louder. I can barely hear you and the lawyers are further away.

The Witness: I'm sorry.

Mr. Jenkins: All right.

Trial Examiner: Shout if necessary.

Mr. Jenkins: Real loud.

The Witness: All right, sir.

Mr. Jenkins: October 16th, Thursday.

The Witness: Well, Martha and Delila and Catherine King came in on Thursday.

Mr. Jenkins: Yes.

[356] The Witness: And he offered them their cards. And Martha took her card and went upstairs to go to work.

Mr. Jenkins: Who did he offer the cards to on Thursday?

Trial Examiner: Who is Martha?

The Witness: Martha Cochran. He offered the card to Martha and Delila.

Mr. Jenkins: All right.

The Witness: And Catherine. And he told Catherine he would have to talk to her a couple of minutes.

Mr. Jenkins: Yes.

The Witness: And Delila said she couldn't talk with him alone.

Mr. Jenkins: Yes.

The Witness: Martha went to work.

Mr. Jenkins: All right.

The Witness: And so as they were going out the door, starting out, he said, "Now, if you go out the door this time I consider that you have abandoned your job as I have put up with you for a week on this."

Q. (By Mr. Jenkins) Now, who did he make this statement to? A. He made that to Catherine King and Delila Mulford.

Q. Did they make any reply? A. No. I didn't hear it [357] if they did. They might have said something, but I didn't hear it.

Q. All right. Do you know what they did? A. They went home, I guess.

Q. They left the plant? A. They left the plant at that time.

Q. Going back to Monday, that day when you said that Mrs. Cochran and Mrs. King had a conversation with Mr. Gerlach on this subject matter, do you remember any reference or statement that Mrs. King made about Mr. Gerlach? A. Oh, he had to go to the hospital for his check up that morning and as he was going out the door she called him hog.

Q. Called him what? A. A hog.

Q. Did he make any reply when she called him a hog? A. No, sir; he didn't.

Trial Examiner: Which one called him a hog?

The Witness: Catherine King.

Q. (By Mr. Jenkins) And this had happened on Monday? A. Yes, sir.

Q. Now, I want to direct your attention to this Thursday. You have told us about this conversation on Thursday, October the 16th, at the plant. Was there any other conversations with any [358] of these people, either in person or on the telephone later that day? A. Yes, sir. At about two o'clock Martha Cochran called in and she said, "I'm not coming back. But you'll have to call me when you want me to come in."

Q. I see. Now, did you—There has been testimony in this case here—Well, strike that. Let me ask you this way. Did you get any instructions from Mr. Gerlach as to any comments you made on the telephone? A. No, sir.

Q. Did Mr. Gerlach, for example, tell you what to say on the telephone or anything? A. No, sir.

Q. I see. Now, tell me again what it was that Mrs. Cochran told you on the telephone. A. She said, "I am not coming back. You will have to call me when you want me."

Q. Who initiated this call? Did you call her or did she call you? A. No. She called me.

Q. I see. What else was said, if you remember? A. That was all that was said.

Q. I see. Mrs. Stephens, are you aware of any rule at the company pertaining to the circumstances when an employee may leave the sewing room floor? A. They have to have permission to leave the floor.

[359] Q. How long has that been going on? Do you know? A. Well, that's been going on ever since I've been there.

Q. You have been there for how long? A. Since '37.

Q. During that period of time has there ever been an instance that comes to your attention when an employee has left the sewing room floor without permission? A. No, sir.

Q. Or at least as far as you know? A. As far as I know, yes, sir.

Q. One thing I want to be sure of. You testified a minute ago about a statement that Mr. Gerlach made on Thursday, the 16th of October, when Mulford and King were there in the morning. A. Yes, sir.

Q. All right. Relative to their abandoning their jobs. Now, I want to be sure. When he made this statement to them did they make any reply to them at all that you— A. If they did I didn't hear any.

Q. You didn't hear any statement back? A. No, sir.

Q. And what did they do then? A. They went out the front door.

Q. How soon after this conversation was this departure? A. They went right then.

[360] Q. Immediately? A. Yes.

Q. He made the statement and then they went out the door? A. They went out, yes.

Q. And you reported you heard other conversations, the words that they said that day, is that right? You heard both sides of the conversation? A. Yes, sir.

Mr. Jenkins: I have no further questions.

CROSS EXAMINATION

Q. (By Mr. Gravitt) Miss Stephens, you don't supervise the production floor, do you? A. No, sir.

Q. You really don't know when the girls leave or come or go or anything about that, do you? A. I see them when they go out the front door.

Q. If they didn't go out the front door you wouldn't know whether they left the floor or not? A. Well, they go out the front door.

Q. Beg pardon? A. They go out the front door.

Q. When they go to the rest room and everything they go out the front door? A. No. Not—Whenever work is over they go out.

[361] Q. There are times when they leave the floor and don't go out the front door and you don't observe them, isn't that right? A. Well, they don't come off the floor. I mean they go out the front door when they leave the plant.

Q. I see. But you don't supervise the production area? A. No, sir.

Q. I see. And do you recall Mr. Gerlach, Sr. telling King once or probably more times than that that until she talked with him alone she couldn't go to work, right? A That's right.

Q. And he never did change that position as far as you know, did he? A. No.

Q. You're not in this bargaining unit? You don't belong to the union, do you? A. No, sir.

Q. And Mulford is not your chair lady, is she? A. No, sir.

Q. She is the chair lady of some other girls in the— A. I don't know.

Q. —in the bargaining unit? You don't even— A. I don't know.

Q. You don't even know if there is a union there at the [362] plant? A. I know there's a union there. But I don't know who the officers are.

Q. You don't know any of the officers at all? A. No.

Q. Not one officer in the union? A. Only what I've been told.

Q. Only what you've been told? A. Well, yes.

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Q. (By Mr. Gravitt) Did you ever hear Mr. Gerlach, Sr. refer to King, Mulford, or Cochran as trouble makers? A. Not particularly I haven't.

Q. What did you hear him say about them over these grievances? A. Well, he just wanted to talk to them.

[363] Q. Alone? A. To Catherine King alone.

Q. Now, in the office where you work you frequently call girls back to work after they have been laid off, don't you? A. Yes, sir.

Q. In fact that's part of your job? A. Yes, sir.

Q. You do most of it, don't you? A. Yes.

Q. And you never did call Cochran back to work, did you? A. No, sir.

Q. Beg pardon? A. No, I didn't.

Q. Mulford either, did you? A. No, sir.

Q. King? A. No, sir.

Q. Do you have any explanation as to why you didn't call them back to work? A. Well, they left on their own.

Q. And Mr. Gelach had told you not to call them back, is that right? A. I was never instructed to call them back.

Q. You made the decision yourself not to call them back? A. No, I didn't.

[364] Q. Well, how did the decision come about? A. Well, when I'm told to call them back I call them back. And I was never told to call them back.

Q. I see. But you do remember Martha Cochran telling you to call her when they wanted her to come back? A. Yes, sir.

Q. And you didn't call her? A. No, sir.

Mr. Gravitt: No more questions.

Trial Examiner: Go ahead.

CROSS EXAMINATION

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[365] Q. (By Mr. Rubenstein) When people are off from work how do they come back? A. Well, when they are laid off I call them back when I'm asked to.

Q. Now, are there other circumstances when they might be off? A. Well, when they're off on their own, well, they usually call in and say when they're ready to come back.

Q. And what do you mean by off on their own? A. Well, they're off ill. They're off for something else. I don't know just what.

Q. I call your attention to Friday, the 10th, when Mrs. Mulford and Mrs. King came down to the office. Were you there when they came into the office? A. Yes, sir. They

didn't come into the office. They didn't come in to the office. They came to the door.

Q. And who was with them? A. Just those two.

Q. Did you not see Mrs. Gerlach? A. Well, she might have been in the back. Now, I don't know.

[366] Q. Well, let me ask you this. Did Mrs. Gerlach talk to Mr. Gerlach? A. At that time?

Q. Yes. A. No, sir.

Q. In other words, you were there? Let me place where you were. Where were you when these two girls came in with reference to Mr. Gerlach? A. I was sitting in the office at my desk.

Q. And where was Mr. Gerlach? A. He was sitting back at his desk.

Q. And that is sort of behind you? A. Yes.

Q. With reference to where the girls were coming from? A. Yes.

Q. Is that correct? A. Yes.

Q. And you saw the two girls come into the outer door or come to the door? A. Yes, sir.

Q. And then what happened? A. Well, that's when Mr. Gerlach asked Catherine King to talk to her for a couple of minutes before she went back upstairs.

Q. Now, how long had you been there sitting at that place? A. Well, that's where I sit.

[367] Q. Yes. But how long had you been there at that time? A. Well, I had been there all afternoon, I guess.

Q. Had Mr. Gerlach been in his office all afternoon? A. Well, I think so.

Q. Had you see—Let's go back, say, fifteen minutes or so prior to this incident. Had Mrs. Gerlach come into the office and talked to Mr. Gerlach at that time? A. Well, I don't recall. She may have, but I don't recall.

Q. You don't recall? A. No, sir.

Q. Then you do not recall Mrs. Gerlach coming into the office? Now, I am talking at the time that Mrs. Mulford and Mrs. King were there. Coming into the office and

discussing anything at that time with Mr. Gerlach? A. I don't recall if she did. She may have. Now, I don't know.

Q. Do you have any knowledge of what Mr. Gerlach wanted to talk to Mrs. King about? You said that, you know, he wanted to talk to her alone. A. No, I don't.

Q. You have no idea? A. No, sir.

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[368] **Mayme Taylor**

was called as a witness by and on behalf of the Respondent and, after being first duly sworn, was examined and testified as follows:

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DIRECT EXAMINATION

Q. (By Mr. Jenkins) Mrs. Taylor, you work at the Quality Manufacturing Company? A. Yes, sir.

Q. Do you recall about how long you have been there? A. Since 1940.

Q. Did you ever have any position of authority in this union? A. At one time I was president and one time I was secretary and treasurer and one time I was chair lady.

Q. That is the same union that is involved here now in this proceeding? A. Yes.

Q. What part of the plant do you work in, Miss Taylor? A. Sewing plant part.

[369] Q. Do you know Catherine King? A. Yes, sir.

Q. Where do you work in relation to where she works? A. Where does she work? There's a machine between her and I.

Q. She is one machine away from you, right? A. Yes.

Q. I want to direct your attention back to October of 1969, on a Friday, the 10th of October, and ask you whether or not you remember anything about an incident that afternoon involving Mrs. King and Mrs. Gerlach, Sr.? A. Well, they was—

Q. Do you remember something that happened that day? A. Yes.

Q. You remember it? A. Yes.

Q. All right Now, would you tell the Trial Examiner what it is that you do remember happening? A. Well, they was—Catherine was throwing her hands around. And Miss Gerlach come over there and asked her what was the trouble. And she told her that it was none of her business.

Q. You heard her say this? A. Yes.

Q. All right. What happened next? A. And then Mrs. Gerlach took Catherine downstairs Now, I won't say whether— She took her down the stairsteps. Now, whether she went into the office with her or not I don't know.

Q. You were still working? A. Yes.

Q. Did you hear any conversation about the arrangements to go downstairs? I mean anything said about that? A. Well, Delila Mulford was sitting right across from Catherine.

Q. Yes. A. And she said, "I'm not going down without Delila. Come on, Delila."

Q. Who said that? A. Catherine

Q Did you hear—Did Mrs. Gerlach say anything? A. And then Catherine went over to Delila's machine and said—I think she said, "You stay right here at your machine."

Q. Who said this? A. Mrs. Gerlach.

Q. She said that to who? A. Delila.

Q I see. Did Delila say anything? A. No. She just got up and went downstairs with Catherine.

Q. Now, prior to this incident that you have told about [371] do you remember any incident occurring with Mrs. King with respect to a radio? A. Yes.

Q. About when in relation to this Friday incident you have just told us about was the radio incident? A. Well, now I wouldn't—A week or two.

Q. A week or two what? A. Before.

Q. All right. What happened on that occasion? A. Well, Catherine brought her radio in one day and was playing it, and Miss Gerlach asked her to not play it.

Q. Who did? A. Mrs. Gerlach.

Q. Asked Catherine not to play it? A. Yes.

Q. All right. A. And she went ahead and played it anyhow. And when she come back upstairs from downstairs at noon she turned it on still louder.

Q. All right. Do you—Did you hear any conversations during the noon hour? A. No, I—

Q. From Catherine King? A. At that time I was going outside for my dinner.

Q. I see. All right. Did you hear Miss King say any- [372] thing about what she was going to do with the radio? A. Only that she turned it up louder when she come back upstairs at noon.

Q. I see. Now, after this incident when she was waving her hands on Friday do you recall any incident or a discussion any time after that with Martha Cochran the following week? A. Well, I don't remember just exactly when that, what day it was. But I was in the office talking to Mr. Gerlach.

Q. About what time of the day was it? Do you remember? A. Noon hour.

Q. During the noon hour? A. Yes.

Q. All right A. And I was in the office talking to Mr. Gerlach on my, our affairs.

Q. Yes. What Gerlach was this, Senior or Junior? A. Mr. Gerlach, Sr.

Q. Senior? A. Yes.

Q All right. How do you fix this day with respect to the hand-waiving day? How long after that was it? Or do you know? A. I haven't the slightest idea.

Q. All right. Go ahead. A. And Martha Cochran was [372] standing there at the hall door. And I was in the office talking to Mr. Gerlach, Sr.

Q. You said this was about the noon hour? A. Yes. It was the noon hour.

Q. All right. What did you see or hear? A. I heard Catherine say, or Martha say, "Now, you fired me, didn't

you? A. You got me fired, didn't you?" She was talking to Mr. Gerlach.

Q. Which? Junior or Senior? A. Junior.

Q. Junior or Senior? A. Junior,.

Q. Junior. All right. A. And—

Q Where was he? Junior? A. He had been back in his office. His office is back the other way. And he had been back there and come through there.

Q. Yes. A. And I don't know. He brought her card in.

Q. Yes. A. And give to to Mr. Gerlach. And when he went back out is when she told him that he had fired her.

Q. Yes. What did he say? A. And I didn't hear Junior say anything.

[373] Q. I see. What did you hear after that? A. And then I heard Catherine say that—I mean Martha say, "You haven't got sense enough to run a business." She said, "Why don't you get out and let somebody else run it?"

Q. All right. Now, did you hear Mr. Gerlach, Sr. say anything to Martha Cochran after she made that statement you fired me to Junior? Did you hear her make— A. No. It was just about time for the bell to ring at noon—

Q. Yes. A. —to go back to work. So I went on upstairs.

Q. I see. A. And I don't know what took place.

Q. Were the people still there? A. Were they still there after you left? Or do you know? A. I don't know. Because I went on upstairs.

Q. Did you ever hear Mrs. King say anything on the subject matter as to whether she was going to play the radio louder than ever before? A. No, I didn't.

Mr. Jenkins: I have nothing further to ask.

CROSS EXAMINATION

Q. (By Mr. Gravitt) Miss Taylor, when the union was in, say, prior to this time you were an officer in the union, is that right? A. Yes.

Q. And you were chair lady at one time, right? A. Yes.

Q. That is similar to the same position that Martha Cochran had before she was fired, is that correct? A. I didn't know Martha Cochran was ever chair lady.

Q. Oh, you didn't know that? A. No.

Q. You didn't go to the meeting where she was elected? A. I didn't know she was ever elected.

Q. You just don't have that much to do with the union? A. No.

Q. Is that right? A. At that time I didn't, no.

Q. I see. Do you know any of the officers in the union? A. Yes. I know why they are. Who they are supposed to be.

Q Who was the chair lady that you knew? A. Virginia Holland.

Q. She resigned, didn't she? A. Sir?

Q. Didn't she resign? A. Yes. Then I didn't know who was in after that.

Q. You just quit having anything to do with the union other than being a member, is that right? A. In fact, there wasn't [375] anybody elected that I knew of. So why would there be a chair lady?

Q. I see. No more questions.

Mr. Rubenstein: I have just one or two questions.

CROSS EXAMINATION

Q. (By Mr. Rubenstein) On the incidents on Friday, the 10th, when Mrs. Gerlach and Catherine King had that little bit of, that little discussion, could you tell us what you heard? What did Mrs. Gerlach say to Mrs. King and— A. She asked her what the trouble was.

Q. Yes. A. And King told her that it wasn't none of her—or to tend to her own business.

Q. King told Mrs.— A. Gerlach.

Q. —Gerlach— A. To tend—

Q. —to tend to her own business? A. I can put a swear word in there, which she used, but I don't want to use it.

Q. All right. She also used a swear word? A. Yes.

Q. All right. Then what happened? A Well, then Miss Gerlach said something about taking her downstairs

[376] Q. Did Mrs. Gerlach first say something about trouble making? A. No.

Q. Did you hear her say that? A. No. I've never heard her say that.

Q. Did'nt you hear Mrs. Gerlach say something to her about the fact that she, you were down there this morning complaining about your piece rate and here you are making trouble again? A. No. I never heard her say that.

Q. You didn't hear her say that? A. No.

Q. How long did this take, this incident? How long were they discussing before Mrs. Gerlach told Mrs. King to come down to the office? A. They wasn't discussing it very long.

Q. They weren't? A. No. Maybe a minute or two.

Q. Was it right after the time when Mrs. King said it's none of your blank business that they went downstairs? A. Yes.

Q. And at that point Mrs. King said—Well, I'm sorry. Mrs. Gerlach said, "Well, come on. Let's go downstairs"? A. Yes. Or go to the office?

[377] Q. Or go to the office? A. Uh-huh (Nodded).

Q. And that's when she said she wanted Delila to go? A. Yes.

Q. Now, the few days later, whenever it was when you were in with Mr. Gerlach, Sr., where was Martha when you heard her say that she was fired? A. In the doorway between the—I can explain it. There's a door here that goes to the restaurant and there's the offices over here (indicating). And she was standing at the restaurant door.

Q. And she was not in Mr. Gerlach's office at that time? A. No, not at that time.

Q. As a matter of fact, was she not then walking away from Mr. Gerlach— A. No.

Q. —, Jr.'s office. A. She was standing still at the door.

Q. At the door of his office? A. No. At the door of the restaurant. There's a hallway between there.

Q. I see. And then what did you see Martha Cochran do after she said this? A. She was still standing there when I went upstairs at the door.

Q. As a matter of fact, didn't you see her then leave?

[378] A. No, I didn't see her leave.

Q. Leave the plant. Didn't you make a statement to the National Labor Relations Board? A. Yes, sir.

Q. In that statement did you not tell the Board that you had seen Martha Cochran leave the plant? A. I did not.

Q. After she—You did not? You are certain? A. I did not.

Q. And— A. Because she was standing there when I went upstairs.

Q. In any event you did not see her in Mr. Gerlach's office? A. No.

Q. She was not in his office at that time? A. No, I never saw her.

Q. And she said words to the effect that she was fired? A. Yes.

Q. In a loud voice? A. Yes.

Q. And you did not hear Mr. Gerlach say anything? A. No.

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[379] **Virginia Holland**

was called as a witness by and on behalf of the Respondent and, after being first duly sworn, was examined and testified as follows:

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DIRECT EXAMINATION

Q. (By Mr. Jenkins) Mrs. Holland, last year and before that did you work for the Quality Manufacturing Company? A. Yes.

Q. Have you worked for them for some time? A. Twenty years.

Q. What kind of work do you do for them? A. I do darts.

[380] Q. Darts? A. That's the first operation.

Q. I see. Have you ever had a position with the union in this case? A. Yes. The day that the contract was signed I was on the negotiating committee. And then we went back up to the hall and they read the contract and they elected me—

Trial Examiner: Did you ever—

The Witness: —as chair lady that day. I was elected as chair lady that day.

Trial Examiner: Okay. Chair lady and negotiating committee?

The Witness: Well, I was on the negotiating committee, yes.

Q. (By Mr. Jenkins) I see. Then you were the first chair lady after this contract was signed? A. That's right.

Q. Is this the contract of April, 1969? A. That's right.

Q. Now, directing your attention to October the 16th, which was on a Thursday, do you remember any incident involving Martha Cochran and the Gerlachs on that day? A. Yes, I do. Part of it.

[381] Q. All right. What time of the day do you have this recollection of? A. It was on noon break when we were down for lunch.

Q. Now, where were you at the time? A. I was sitting in the cafeteria where we always ate our lunch at.

Q. Do you remember who else was around? A. Well, about everybody eats. Katheren Stephens and Eileen Likens and Virginia Birchfield.

Q. Was Mr.— A. And these girls here (indicating).

Q. All right. Were the two Gerlachs around anywhere, both Senior and Junior? A. Mr. Gerlach was in the office. Junior was back in his office.

Q. All right. And did you see Martha Cochran that day? A. Yes. She went back through to his office.

Q. All right. Tell the Trial Examiner what you saw and heard on that occasion? A. Well, now I don't know what was said back in Junior's office. But she came back out

there and I was sitting there. And she came out there and sat down in a booth here and I sat here (indicating).

Q. This "she" you are talking about is? A. Martha Cochran.

Q. All right. What happened? A. And she said, "My card probably will be pulled tomorrow."

Q. Yes. A. And about that time here come Junior out of the office, his office. And he went upstairs.

Q. Yes. A. And when he come back he had her card.

Q. Yes. A. And he took it in the office and come back.

Q. Yes. A. And come back to the door there and said, "Martha Cochran, you won't be working this afternoon."

Q. Yes. A. And she jumped up, sort of jumped out of the seat and said, "You won't be working this afternoon."

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[383] The Witness: She said, "You either fire me or lay me off." And he said, "I'm not doing either one."

Mr. Jenkins: Yes.

The Witness: Said, "I just told you you wouldn't be working this afternoon." And he went on back through.

Q. (By Mr. Jenkins) I see. Did she keep after him about this? A. Then she went to Mr. Gerlach's door there and was screaming and telling him, says "He fired me." And Mr. Gerlach said, "He never fired you. No such a thing." And she said, "He'll either fire me or lay me off." He said, "I'm not going either." He said, "He told you—

Q. Who is this that said this? A. Huh?

Q. Is this Junior or Senior? A. This is Mr. Gerlach.

Q. Senior? A. Yeah.

Q. All right. When you refer to him as Mr. Gerlach then you are always referring to Senior, I take it, is that right? A. Yes.

Q. And you call Gerlach, Jr., Junior? A. Yes. I call him Junior. That's right.

Q. All right. Fine. What did Cochran say to Mr. Gerlach, Sr.? A. She told him he didn't have good sense, he didn't have enough sense to run the plant and she

didn't see why he didn't give it up and let someone have it that could run it.

Q. Had he said anything to her to provoke this or did he say— A. I didn't hear him say anything to her then after she said that.

Q. And then what was said about being fired, if anything, between Cochran and Gerlach? A. Now—

Mr. Rubenstein: Which Gerlach are we talking about?

Mr. Jenkins: When—

Mr. Rubenstein: Because, frankly, I'm confused. I never heard him tell her she's fired.

Trial Examiner: All right.

Mr. Jenkins: I'll go back and clear that up.

Trial Examiner: All right.

Q. (By Mr. Jenkins) You made testimony here about Miss Cochran making the statement that somebody didn't have good sense enough to run the business. Who was she directing that to? A. Mr. Gerlach, Sr.

Q. Senior? A. Yes, sir.

Q. All right. Fine. And what was said, if anything, between them on this business of whether she was fired or not? A. You mean what did Mr. Gerlay say to her?

Q. Right. Either one of them. A. He never told her she was fired.

Q. And what did she say to him? A. She said, "You either fire me or lay me off."

Q. All right. Now, did he reply? A. He said, "I'm not doing either one."

Q. Yes. A. "That he didn't fire you."

Q. All right. And now do you remember any other conversations that afternoon at this particular time? A. No. It was about time for us to go on upstairs and we went on upstairs.

Q. Miss Holland, there has been some testimony in this case relative to a rule as to the circumstances when you can leave the floor, the sewing room floor up there— A. That's right.

Q. —during working time. Would you tell the Trial Examiner what you know about that rule, if there is such a rule? A. Well, it's always been a rule that you don't have the right to leave the floor without permission to leave. You have to ask to [386] leave the floor or if you have a doctor's appointment you either have to ask Mr. Gerlach, the office, or the supervisor on the floor. It's been a custom to do that ever since I've been working there.

Q. Is it a custom to leave the floor and go down to the office any time you wanted to without permission? A. No, it is not. No, it is not.

Q. And you served as chair lady yourself for this union. You said, I think, the first chair lady— A. Yes.

Q. —under the new contract. And up until what time did you continue to serve in this capacity? A. Well, it must have been the latter part of August or first of September, something like that. I don't just, you know, remember the date.

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Q. (By Mr. Jenkins) If there was a problem with, a disciplinary problem with any of the girls on the work room floor what was the custom as far, or any other problem or discussion, what was the custom as far as arranging for them to go to the office, if anything? A. You mean if I had a grievance of anything like that?

Q. No, no. If maybe a problem came up on the floor. Like the King situation to which you testified where she was waving her hands around. What was the custom about that. How was that handled as far as the supervisors there were concerned? A. Well—

Q Like Mrs. Gerlach, Sr. and so forth. A. You mean you want to know how she did or what she did with her?

Q. Yes. How was that usually handled? A. Well, she took her downstairs.

Q. Was that— A. See, I don't sit real close to her. And I saw the commotion and saw them going downstairs.

Now, I never heard no words involved. I just saw them going downstairs.

Q. I see. So actually then you don't know anything about [388] that incident? A. Not that incident, no.

Q. I see. Fine. A. Only just her waving her hands.

Q. When you were chair lady, Miss Holland, if occasion would arise for you to leave the floor during working time would you do it on your own? A. No. No, indeed. I never did leave the floor without permission. Never.

Q. Miss Holland—Strike that. Miss Holland, the last part of November—excuse me—the last part of October and the early part of November, last year, 1969, do you remember that there was a layoff? A. Yes, I do.

Q. For some people at that time? A. Yes.

Q. During that time—At that time were you still working in the sewing room? A. Yes.

Q. And that was the same place that Catherine King, Delila Mulford, and Martha Cochran worked, wasn't it? A. Yes. That's right.

Q. Do you have any recollection of whether or not you and the other girls in there were laid off at the same time and brought back at the same time or on a different basis? A. No, I don't. [389] Because I do the first operation and I'm the first one laid off.

Q. You were the first one laid off? A. If my operation runs out, unless I—you know, sometimes I'll do different operations. If I happen to help out on an operation they're behind on maybe I won't be laid off. But each girl goes as the job runs out.

Q. And you, on this time do you have any recollection of you being called back early or anything before the rest of these girls. A. No, I do not. Well, the dart girls are called back first, see.

Q. Yes. A. Whoever works on darts are called back first.

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Cross Examination

Q. (By Mr. Gravitt) Directing your attention to King and Cochran, would it be fair to say that you dislike those two people, don't you? A. No. I never disliked them. It's what they did to me.

Q. You had some kind of a falling out with them in October before they were discharged or a little before that? A. We— Yes. Me and King had a falling out.

Q. Well, that's all I wanted to know. A. That's right.

Q. And you had discussed grievances with the Gerlachs— A. Yes, I have.

Q. Just a moment now. I just haven't finished my question. I want you to hear it all.

—and left the floor during work time to have such discussions, didn't you? A. The only time that I ever—

Trial Examiner: Answer the question yes or no.

[391] The Witness: The only time I ever left the floor was when I was called off the floor or if we was down at noon. I discussed my grievances with him at noon or of an evening after work. He would tell the floor lady to tell me to stop in his office if he had a girl that had to come in his office for a grievance. And I stopped at his office as I'd be going out of an evening or if I would be down there and the union representatives were down there and I would stay over a period, a little over. But I never went off the floor without I was told to go off the floor. I never went off on my own.

Mr. Gravitt: I have no more questions.

Trial Examiner: Go ahead, Mr. Rubenstein.

Cross Examination

Q. (By Mr. Rubenstein) Miss Holland, I wish you would clear something up with me on the 16th. On the afternoon of the 16th, at lunch hour, where were you? A. I was— You mean—

Q. Yes. With reference to Martha Cochran and Junior. A. Yes. I was sitting right there. Right there in the cafeteria.

Q. You were sitting in the cafeteria. And how far is the cafeteria from Mr. Gerlach's office? A. Oh, I don't know just—

[392] Q. Approximately. A. —how far you'd say it was. It's not very far. But she was screaming to the top of her voice. I mean anybody could have heard her.

Q. Well, my question was approximately. A. Well, I don't exactly know just how far.

Q. Well, there is the— A. Here's the door (indicating).

Q. No. No. A. And the hallway.

Q. You are sitting— A. A hallway and a door.

Q. You are sitting in a booth? A. A booth.

Q. A booth? A. That's right.

Q. In a cafeteria? A. That's right.

Q. Were you sitting right by the door? A. Right close to the door, yes.

Q. And then there is a hall that way? A. Yes.

Q. And was the door open or shut? A. The door was open.

Q. And there's a hall— A. Both doors were open.

[393] Q. And then there's a hallway? A. That's right.

Q. And then you go into what, an outer office? A. Right here's the door (indicating) and you go in this hallway and there's his door to his office. And both of those doors were open.

Q. There are two doors. There's a door to Mr. Gerlach, Jr.'s office? A. Yes.

Q. And a door to Mr. Gerlach, Sr.'s office? A. No. Junior's office is in the back.

Q. It's— A. And Mr. Gerlach's office is in the front. And here is a door where you go into the cafeteria (indicating) and the hallway. And over there's the door that you go into his office on that side (indicating).

Q. And where was Mrs. Stephens now when this happened? A. She was sitting in the cafeteria. The same place that I was.

Q. She was sitting there in the same— A. That was during the noon hour.

Q. —the same place you were? A. Well, not exactly the same. No. But she was sitting there, you know.

Q. Now, you say Martha was sitting here with you? [394] A. No, sir. She was sitting in the booth with me. She was sitting in the booth with two or three other girls.

Q. With some other girls. And then what happened? Was she called into the office? A. No. She went back in his office and come back out there and sat down.

Q. Well, now wait a minute. She went back into whose office? A. Junior's.

Q. Into Junior's office? A. That's right.

Q. And was the door open or shut? A. Well, I don't know about his.

Q. All right. A. You see—

Q. So she went back into Junior's office? A. That's right.

Q. You didn't see her go in the office? A. No. Now, I don't know what was exchanged, words back there. Because—

Q. Well, I am not asking you what you heard now. I am just asking you what you saw. You saw her go back into Junior's office? A. She went back through there. I presume she went to his office, yes.

[395] Q. Right. A. Because his office is back there.

Q. But could you see back into where his office was? A. No. No. There is a door that closes back there.

Q. There's a door that closes? A. That's right.

Q. And then how long was it before you saw her come out? A. She wasn't back there very long until she came back out.

Q. And then she came back out of Junior's office? A. Yes.

Q. And then what did you hear? A. She sat down there and she said, "My card will probably be pulled in the morning."

Q. In other words she came out of Junior's office? A. That's right.

Q. And sat down where? A. By Vonna May Oliver.

Q. Back in the cafeteria? A. And the Belcher girl. That's right.

Q. Back in the cafeteria? A. That's right.

Q. So that what you are now testifying is that she went into Mr. Gerlach's office, Junior's? A. Junior.

[396] Q. Briefly. Then she came back out in the cafeteria and she said, "My card will probably be pulled."? A. That's right.

Q. Then what happened? A. That's when he come out and went upstairs and came back down, Junior. Junior with her card.

Q. Junior came upstairs and went back down? A. Yes.

Q. And then where did he go? A. He went to the office, to his dad's office and he came back there to the door and he said, "Martha Cochran," said, "you won't be working this afternoon."

Q. Now, this took place in his dad's office? A. No. He come back there to this door right here where it goes into the cafeteria.

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Q. (By Mr. Rubenstein) Now, where did he say this to Martha? Where was he saying it? A. Junior?

[397] Q. Yes. A. He said it right there in the door of the cafeteria.

Q. That's what I thought you said.

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Q. (By Mr. Rubenstein) So he was now standing at the door of the cafeteria and he called this into Martha where? A. That's where he told her, yes, she wouldn't be working that afternoon.

Q. In a voice I assume where everybody could hear? A. That's right.

Q. All right. Mrs. Stephens could hear and everybody— A. Well, all of that were sitting there heard it, yes.

Q. All right. And then what did Martha do? Martha is now sitting in a booth, is that right? A. Yes. She jumped

up out of it and went over to him and said, "That means I'm fired"? He said, "I didn't tell you you was fired." He said, "You won't be working this afternoon."

Q. All right. A. And she said, "Well, you'll either fire [398] me or lay me off."

Q. Now, this is Junior? A. That's Junior. That's right.

Q. And then what happened next? A. And then Junior just went on. He had a flight to go someplace and he went on.

Q. All right. A. And she went there to his office then, Mr. Gerlach's office there and that's when she began screaming at him.

Q. Mr. Gerlach, Sr.? A. Yes. That's right.

Q. Now, up to this time Mr. Gerlach, Sr. hadn't participated in this at all, had he? A. No. No. He wasn't out in there. No. He was in the office.

Q. He was in the office? A. In his office.

Q. And then what happened with respect to Mr. Gerlach, Sr.? A. Well, she went there to the door then telling him, said, "he fired me." Said— And Mr. Gerlach said, "He didn't fire you. No such a thing." And she said, "Well, you'll either fire me or lay me off." And he said, "I'm not doing either one."

Q. Well, could— I know that you may not be able to answer [399] this question, so if you can't answer it— Could Mr. Gerlach, Sr. have heard all of this? A. Yes, he could have heard it. Because the door was open to the office. And he was sitting right there in the office.

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Q. (By Mr. Rubenstein) So then there was this discussion between Martha and Mr. Gerlach, Sr.? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. And then what did Martha do? A. Well, now I went on upstairs then. It was our noon time and time to go upstairs and we went upstairs.

Q. Did you hear Mr. Gerlach, Jr., did he say something [400] about coming to work tomorrow? A. No.

Q. Or when she would come back to work? A. I never heard him tell her she'd have to work the next day.

Q. Pardon? A. No, I didn't hear.

Q. You didn't? A. No.

Q. You didn't hear when she was supposed to come back? A. Because when he said this to her about he wasn't going to give her no layoff slip and he didn't fire her we went on upstairs. It was time for us to go to work.

Q. Well, now that's Mr. Gerlach, Sr. who said that? A. Yes.

Q. But Mr. Gerlach, Jr.— A. No, I never heard him.

Q. He was the one who pulled her card, isn't he? A. Yes.

Q. And you didn't hear him say— A. No, I didn't.

Q. —anything about when she was due to come back to work? A. He just said, "You won't be working this afternoon." That's what he said.

Q. That's what he said, "You won't be working this after- [401] noon."? A. That's right. He didn't tell her she wouldn't be working the next morning.

Q. He didn't tell her she would, either, did he? A. Well, he just told her she wouldn't be working that afternoon. That didn't say she wasn't going to work the next day.

Q. Now, you testified, I believe, that with respect to this layoff that occurred in October, the end of October and the first of December, that each girl was laid off as her operation ends? A. Yes. That's the way they lay them off.

Q. That's the way you lay off. And that normally the first, the person who is at the beginning of the operation would be the first one laid off? A. Yeah. I do the first operation.

Q. And so you would— A. Unless I do another operation. I do different operations sometimes.

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[402] Q. (By Mr. Rubenstein) And when the layoff ends those who are at the beginning operations are the first called back? A. The beginning?

Q. The first operations— A. Yeah.

Q. —are usually the first or were the first called back? A. The beginning, yeah. The first operations are supposed to be called back, you know—

Q. First? A. First. Like darts.

[403] Q. All right. A. And if they're laid off they're the first.

Q. To be laid off? A. Yes. That's right.

Q. And what would the last operations be? A. The last is down to the buttonholes and buttons and hemmers and then finishers and pressers and those.

Q. And the first operation would be what? A. First operation is darts.

Q. It would be darts? A. Yes.

Mr. Rubenstein: I have no further questions.

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[404] **Maxine Hatfield**

was called as a witness by and on behalf of the Respondent and, after being first duly sworn, was examined and testified as follows:

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[405] DIRECT EXAMINATION

Q. (By Mr. Jenkins) Mrs. Hatfield, how long have you worked at the Quality Manufacturing Company? A. About five years.

Q. What kind of work do you do? A. I'm a presser.

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[408] Q. (By Mr. Jenkins) Now, do you recall— You've been here— Strike that. Do you recall the incident which occurred about noon on Thursday, I think the date has been fixed as October 16th of last year, conversations involving Martha Cochran and Mr. Gerlach, Jr. and Senior? Do you recall any of those incidents? A. Yes.

Q. Tell the Examiner what you remember of that occasion. And you might start by telling where you were. A. Well, I was in the lunch room with the rest of the girls.

[409] Trial Examiner: You were in what room?

The Witness: In the lunch room.

And Martha came from back towards Junior Gerlach's office.

The Witness: And she come up and sat down.

Mr. Jenkins: Yes.

The Witness: And we were sitting a few booths behind her, but we heard her make the remark that she'd probably get her card pulled.

Mr. Jenkins: Yes.

The Witness: Well, in just a little while Junior came out of his office and went upstairs.

Mr. Jenkins: Yes.

The Witness: He come back and went in his dad's office. That's Mr. Gerlach's office, Mr. Gerlach, Sr.'s office.

Mr. Jenkins: Yes.

The Witness: And he come back to the dor there and he told Martha, "You won't be working the rest of the day."

Mr. Jenkins: Yes.

The Witness: And she said, "Then I'm fired?"

Mr. Jenkins: Yes.

The Witness: And he said, "No, I didn't say that." He said, "I said you wouldn't be working the rest of the day."

Mr. Jenkins: Yes.

[410] The Witness: So then Martha went on in Mr. Gerlach's office.

Mr. Jenkins: Yes.

The Witness: Towards Mr. Gerlach's office.

Mr. Jenkins: Yes.

The Witness: At that time Mrs. Grimes and I got up and went in the cutting room to get material for the boards.

Mr. Jenkins: Yes.

The Witness: And Martha, we overheard Martha Cochran tell Mr. Gerlach he didn't have good sense.

Mr. Jenkins: Yes.

The Witness: And why didn't he get out and let somebody run the business that knowed how.

Mr. Jenkins: Yes.

The Witness: And we went on back upstairs. That's all I know.

Q. (By Mr. Jenkins) Was the conversation still going on when you left? A. Yes.

Q. Did you hear any other conversation between Cochran and Gerlach, Sr. on the business of whether she was fired or not? A. Yes. She said, "Then you fired me." He said, "No. I said you wasn't going to work the rest of the day."

Q. Now, she said this with who? Who was this talking on [411] this? A. What was Junior.

Q. Junior? A. Yes.

Q. Now, was this subject matter—in other words, was there any talk that you heard while you were present between Mr. Gerlach, Sr. and Mrs. Cochran about this same subject? A. No. We didn't. I didn't hear Mr. Gerlach because we didn't tarry that long.

Q. I see. You left with Mrs. Grimes, you said, and went back upstairs immediately? A. Yes. Yes.

Q. All right. A. Yes.

Q. And the conversation was still going on? A. Yes.

Q. Now, were you aware of any rule relative to leaving the sewing room floor during working time without permission? A. Well, just we weren't supposed to.

Q. That was your understanding? A. Yes.

Q. Has it always been that way? A. Ever since I've been there.

Q. Have you ever had an office in the union? A. No.

Q. While she was working there did you ever, for [412] example, eat lunch with Catherine King or sit around the table with her in the cafeteria? A. No, not as I recall.

Q. Not lately? Not at any time? A. Not as I recall. She ate in the lunch room where we did, but I never ate with her.

Q. I see. Did you ever have any problem with her or anything like that? A. No.

Mr. Jenkins: I think that is all I have of this witness.

CROSS EXAMINATION

Q. (By Mr. Gravitt) You have never held any office in the union, have you? A. No.

Q. You actually don't know when a chair lady is permitted to leave the floor and discuss grievances with the company? You've never been informed of that? A. No.

Q. And when you referred to a conversation here between Cochran and Mr. Gerlach and Cochran and Gerlach, Jr., you recall that? A. Yes.

Q. And those conversations that you referred to, you [413] didn't hear all of the conversations, did you? A. I heard what her and Junior said in the lunch room.

Q. You didn't hear everything that was said between the parties, is that right? A. I didn't hear everything that was said between Martha and Mr. Gerlach when she was in his office. I did not hear everything that was said there.

Q. But you did or did not hear everything that was said between Gerlach, Jr.— A. Yes.

Q. —and Martha? A. Yes. I heard what was said in the lunch room.

Q. You heard them talking about grievances, I suppose? A. Well, she come from back that way. I don't know what she was doing back there.

Q. What do you mean "back that way"? A. Back from Junior's office.

Q. Where she had taken some grievances in? A. I don't know what she was doing back there.

Q. You didn't hear any discussions about grievances between Cochran— A. Yes, I heard.

Q. —and Junior? A. I heard it here.

Q. No. I mean down at the plant. A. No.

[414] Q. When it happened. A. No.

Q. Before Cochran and Mulford left the employment of the company do you know of any other chair lady that was fired? A. Wasn't none fire that I know of.

Q. You don't know of any? A. Virginia Holland resigned.

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Mildred Grimes

was called as a witness by and on behalf of the Respondent and, after being first duly sworn, was examined and testified as follows:

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Trial Examiner: Thank you.

DIRECT EXAMINATION

Q. (By Mr. Jenkins) Mrs. Grimes, how long have you worked for the Quality Manufacturing Company? A. About ten years.

Q. What kind of work do you do for them? A. Pressing.

[423] Q. Do you know Catherine King ? A. Yes, I do.

Q. Prior to the time that she stopped working for the company last October was she a friend of yours? A. Yes, sir.

Q. You saw her at the plant? A. Yes.

Q. Did you eat lunch too with her? A. No, I didn't eat lunch with her.

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[425] Q. (By Mr. Jenkins) Now, Mrs. Grimes, do you remember an incident with Mrs. King in the month of October, 1969, over a radio? A. Yes.

Q. Can you fix the time and place of the incident roughly? A. Well, I don't remember the date.

Q. All right. But do you remember, how do you associate it with the time when Mrs. King eventually left the company? A. Well, she brought in a radio and she—

Q. I mean was it before this, after this or— A. Before she—

Q. That was before? A. Before.

Q. Can you give any approximation as to how long before in terms of days or weeks or something like that? A. About two, three weeks maybe.

Q. All right. Now, go ahead and tell us what happened. A. Well, she brought in a radio and played it. And Mrs. Gerlach asked her to turn it off.

[426] Q. Yes. A. Well, she did.

Q. Yes. A. And then we went downstairs for our break.

Q. Yes. A. That was the two o'clock break.

Q. Yes. A. And she said when she was down there that she would blast it when she went back up.

Q. Yes. A. And she did.

Q. On blasting it— A. The radio.

Q. All right. A. And Mrs. Gerlach went over to her then. And I see Catherine jump up.

Q. Yes. A. But I don't know what was said or anything. I was too far away from them.

Q. Yes. A. And then Catherine left the floor, her and Mrs. Gerlach.

Q. I see. Did anyone go with her? A. No. Mrs.—Delila, I believe.

Q. Are you sure? A. No. I'm not sure. I'm not for sure on that.

Q. All right. Now, were you present the afternoon that [427] there has been testimony about in this case of October the 10th, on a Friday when there was a disturbance, waiving of hands and that business? Were you present at that time? Or did you see any of that? A. Martha Cochran?

Q. No. A. The time—

Q. Catherine King. Did you see any of that? A. No.

Q. Now, were you present later on on a date that has been identified as October the 16th, Thursday, involving conversations between Mrs. Cochran and Mr. Gerlach, Jr. and Mr. Gerlach, Sr.? A. Yes.

Q. Where did this take place? A. In the lunch room.

Q. Tell the Examiner what you remember happened on that occasion? A. Well, Martha had come back—

Trial Examiner: Let me see if I can cut it short.

You remember when Mrs. Hatfield was on the stand? Did you hear her?

The Witness: Yes.

Trial Examiner: Was it about the same or different?

The Witness: Yes, it was. It was about the same.

[428] Trial Examiner: Now, if there is anything else you want to add you may add it.

The Witness: No.

Trial Examiner: But you don't have to repeat what Mrs. Hatfield said.

The Witness: No. It was just about the same thing Mrs. Hatfield said.

Trial Examiner: All right.

Q. (By Mr. Jenkins) Have you been an officer of the union or in any official position? A. In this union?

Q. Yes. A. No.

Q. I see. Have you ever had any trouble yourself with Mrs. King? A. No.

Q. Are you aware of any rule about when and under what circumstances you can leave the work area during working time? A. Yes, I am.

Q. What is the rule? A. Well, the rule is that you are not allowed to leave the floor unless you have permission.

Mr. Jenkins: I have no further questions.

CROSS-EXAMINATION

[429] By Mr. Gravitt:

Q. This rule that you said you were not allowed to leave the floor, have you seen that posted in various places in the plant? A. No. It's not posted.

Q. It's just a general understanding? A. It's just a rule.

Q. None of the bosses have ever told you that was the rule, have they? A. No.

Mr. Gravitt: I see. That's all.

Mr. Jenkins: Are any of the rules posted?

The Witness: No.

Mr. Rubenstein: Wait a minute. Wait a minute.

Mr. Jenkins: Oh, excuse me. I'm sorry.

CROSS-EXAMINATION

By Mr. Rubenstein:

Q. As a matter of fact, there are certain rules that are posted, are there not? For example, the rule about clocking in is posted? A. Why, I guess so, but I couldn't swear to it.

Trial Examiner: I'm not interested in a guess.

The Witness: I don't know.

By Mr. Rubenstein:

Q. When you clock in there is something above the [430] clock, isn't there? And doesn't it say that you cannot clock somebody else's card? A. Oh, yes.

Q. How long have you been there, Miss Grimes? A. How many years?

Q. Yes. A. Ten years. Well, off and on. Because I was off for, of course having children.

Q. No, you stated on this question today of playing the radio, this happened in the morning, is that correct? A. She turned it on in the morning and then—

Q. All right. A. And Mrs. Gerlach came over and said something to her about it. I believe it was in the morning. I'm not sure.

Q. Well, I believe you testified then that during lunch— A. No.

Q. —Catherine King came down and said— A. Two o'clock. Two o'clock break.

Q. So that this happened before two o'clock? A. Yes.

Q. And then at the two o'clock break Catherine said she was just going to turn it on ? A. Right.

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[431] By Mr. Rubenstein:

Q. And then later on that afternoon when the radio was playing again Mrs. Gerlach went over and said something to her? A. That's right.

Q. You do not, of course, know what it was that she said? A. No. Because I was too far away from them.

Q. Right. And then at that point you testified that Mrs. Gerlach then accompanied Catherine downstairs? A. Yes, I believe so. But I'm not sure on that. I don't remember. I think that Mrs. Gerlach went downstairs with Catherine.

Q. And you do not recall whether or not anybody else accompanied them downstairs? Delila? A. No. I'm not— I'm not sure.

Q. She might have? A. She might have. I'm not sure.

Q. Or she might not have? A. She might not have.

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[464] **Lawrence R. Gerlach, Sr.**

was called as a witness by and on behalf of the Respondent and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

[465] By Mr. Jenkins:

Q. Mr. Gerlach, are you the president and one of the stock holders of the Quality Manufacturing Company? A. I am.

Q. Are you acquainted with Catherine King? A. Very much so.

Q. Back in October of 1969 did you have any recollection of any incident occurring with respect to Catherine King coming to your office? A. Yeah. I remember one instance. I think it was around October the 10th.

Q. How long had you known Catherine King? A. I—

Q. Just answer the question. A. I've known her ever since she was fourteen years old. You can figure it out.

Q. Even before she went to work for you? A. Oh, yes. Before she was old enough to go to work.

Q. I see. Had you had, prior to October of 1969 had she ever visited your office alone? A. She used to make it a practice to visit my office any place from one, two and sometimes three times a day.

Q. Had you ever had occasion to call her to your office by herself? A. I have talked with her different times. Because she always confided in me. And if something came up [466] that I thought she ought to know I would call her.

Q. And where would these conversations take place when you would call her? A. Most generally right in my office.

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By Mr. Jenkins:

Q. Now, on October the 10th, 1969, which has been identified here as a Friday, do you have any recollection of any contact that you had with Catherine King on that day? A. Yes. I remember in the afternoon on October the 10th my wife and her and Mulford came downstairs.

Q. Yes. A. And my wife told me that she had jumped up from her chair and throwed her hands up and created quite an excitement upstairs which stopped a lot of operators from working.

Q. I see. [467] A. And at that she went back upstairs. She left those two down here. And Mulford was with her. And I said, "Now, Mrs. Mulford", I said, "why did you come downstairs because you know it's agin' the rules to come down without permission?" And she said, "Well, I come down with Catherine." And I said, "Well, you'd better go back and take your job." She said, "I'm going to stay with her."

Q. Did you say anything to Mrs. King? A. I told her I'd have to talk to her for a couple of minutes.

Q. I see. A. I did this purposely to show her I wasn't going to fire her.

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[469] By Mr. Jenkins:

Q. Now, Mr. Gerlach, you testified you told Mrs. Mulford, I believe it was, to go back to her work shop and then you told about a conversation with Mrs. King and then what happened after that? Did they stay or did they leave or what? A. Well, I asked Mrs. King into the office.

Q. Yes. A. And I thought it was too personal for—

Q. Now, don't say what you thought. Because the Examiner is— A. Okay.

Q. I just want— [470] And she said, "I'm not going in unless Mulford goes with me."

Q. All right. A. And at that I was stunned, to tell the truth about it.

Q. All right. A. Because I'd never had this situation before. And so I said to them, I said, "Well, now", I stood there and thought awhile and directly I said, "Well, just go back upstairs. I'll have to think this over."

Q. You never had this come up before? A. Never did have it.

Q. In the whole history? A. In forty-six years.

Q. All right. You told them to go on back upstairs and go to work, is that right? A. That's right.

Q. Okay. Fine. This was on Friday, right? A. That was on a Friday.

Q. Now, pertaining to this general conversation what happened next? Did anything happen over the week end? A. Well, I talked this over. And I thought we'd never had—

Q. Don't tell what you thought. Just tell what you did. A. Well, I told my wife to call Mulford and tell her I was suspending her for two days.

[471] Q. Yes. All right. A. And that's all that I did.

Q. And were you present when any phone conversation was made or did you— A. No.

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[472] Q. Now, on Monday, October the 13th, did you have any contact with Mrs. King and anybody else on that day? A. When I came to work that morning Mrs. King and this other girl, Catherine Cochran— Can I look at her name?

Trial Examiner: Go ahead.

The Witness: And Cochran. Martha Cochran was sitting on the outside entrance of my office.

Mr. Jenkins: Okay.

Trial Examiner: Is this the next day?
The Witness: This is on Monday.
Mr. Jenkins: This is on Monday, the 13th of October.
Trial Examiner: On the next work day?
Mr. Jenkins: Yes.

By Mr. Jenkins:

[473] Q. All right. They were sitting outside of your office when you came to work on Monday, is that right? A. That's right.

Q. On the 13th of October? A. That's right.

Q. What happened then? A. Well, I went in the office and came back out with the cards. And I said to Mulford, or to Cochran, I said, "What are you doing down here and not back up on your job?" I said, "The bell's going to ring in a little bit." And she said, "I'm going to say with Catherine." So—

Q. Just a minute, Mr. Gerlach. You're not reading any notes? A. No. I've just got their names there.

Q. All right. Put those notes away. Give it to the Examiner or something.

Trial Examiner: I don't want it.

The Witness: I'll lay it right here where you can see it because I've got to find those names.

Mr. Rubenstein: I have no objection if he has got something to remind him of the names.

Trial Examiner: I haven't ruled that it was objectionable.

Mr. Rubenstein: It's perfectly all right.

By Mr. Jenkins:

[474] Q. Now, you said that you asked Mrs. Cochran what she was doing there. And tell me what happened. Then what happened after this? A. There wasn't nothing. She—I offered her card to go to work on, the time card. She wouldn't— She refused it. And of course Catherine, I told her I'd have to talk to her a couple of minutes before she could go upstairs.

Q. Was this the first time Mrs. Cochran had been involved? A. That's right. And I couldn't figure out why she was there.

Q. Well, did you have her time card down there? A. We did whenever, whenever they was out of the office or when they was out we had the time cards.

Q. I see. All right. And you told— A. I told— Let me correct that. Her time card, I think, was still upstairs. I'll take that back.

Q. All right. A. Because I said, "Why aren't you upstairs to work?" I'll take that back. I'm sorry about that.

Q. Now, did Mrs. Cochran make any reply to your instructions to her? A. Said she was going to stay with Catherine.

Q. All right. A. Go down there and stay with her.

Q. All right. [475] A. That's all she said.

Q. Did you make any reply back to her about that or not? A. No. After she refused her card I never said anything; nothing more.

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[476] By Mr. Jenkins:

Q. Mr. Gerlach, did you have any conversation on this occasion with Mrs. King? A. Yeah. I asked her to come into the office. And she said she couldn't come in unless she brought Cochran in with her.

Q. Now, did you have any other conversations with either of these ladies that day that you remember on, this is Monday? A. I don't remember talking any further to them. The thing that I remember happened later on, I had an appointment early to the hospital for my examination. And—

Q. Is this on Monday now? A. That was on Monday.

Q. All right. A. And when I went out to the car I forgot my card for the hospital. And when I came back in to get it, when I started back out this Catherine King said to me hog. And of course I never said nothing back to her or anything. I just walked on.

Q. Now, what happened, if anything, on Tuesday, which would be October the 14th? A. Well, Tuesday the same thing. Both of them came in. Now, let me tell you something further.

Q. No. I want you still to tell me what happened now [477] very specifically. A. Well, I didn't clear that day. They stayed all day with us.

Q. All right.

Trial Examiner: Who is they?

The Witness: Catherine King and Cochran stayed in the lunch room all day and interfered with us all day long.

By Mr. Jenkins:

Q. Now, getting to Tuesday, the 14th— A. Yes, sir.

Q. Did you have any contact with Catherine King that day? A. They came in.

Q. Now, who is "they"? A. To the office again. Same way.

Q. Who? A. Catherine King and Mulford—or Catherine King and Cochran.

Q. Cochran? A. Yes.

Q. All right. They came into your office? A. They come into the outside, in the hall there where the chairs is. The waiting room, in other words.

Q. What time of the day was this? A. They came before work.

Q. All right. Was there any conversation between you [478] and Cochran— A. Nothing more—

Q. —between you and Cochran and King? A. Nothing more than we had their cards that morning, both of them.

Q. All right. A. And I offered it to Cochran and she refused it. Said she was going to stay down there with King.

Q. All right. A. And King, I asked her if she was ready to talk a couple of minutes with me. And she refused without Cochran.

Q. All right. Did anything else happen at that time that you recall? A. No. Shortly after that they went home.

Q. All right. This was Tuesday now, the 14th of October, is that right? A. That's right.

Q. All right. Now, let's go to Wednesday, the 15th of October. Did anything happen on this day? A. There was three sitting there that morning.

Q. All right. And those three names were? A. King, Cochran, and Mulford.

Q. All right. A. I brought their cards out.

Q. All right. [479] A. And offered it to them. And Mulford took her card and worked that day.

Q. She went to work? A. She went to work on Wednesday.

Q. Okay. And did you have any conversation with Mulford that you remember? A. Nothing more than I spoke to her. I spoke to the girls when I came in.

Q. All right. Did you have any conversations with Mrs. Cochran or Mrs. King on this Wednesday? A. I asked Miss Cochran to go to work.

Q. Yes. A. And she refused again.

A. All right. And did you have any conversations with Mrs. King? A. Yes. I asked her to talk, if she was ready to talk. And she said that she wasn't going to talk unless Cochran come in with her.

Q. And was that the extent of the conversation? Do you remember any other thing? A. As far as I know that was all of it.

Q. This is on Wednesday. All right. Then going to Thursday, the 16th of October— A. Yes.

Q. The 16th of October. What, if anything happened on [480] that day? A. Well, the only thing that day, the three were there and I offered their cards to them and Cochran took hers.

Q. I see. She went to work? A. She went to work that morning.

Q. All right. Now, what happened with respect to King and Mulford? A. Well, King said she— I asked Mulford to go to work. It was about time for the bell. And she said that she was going to stay there with King.

[267] Q. Was there any conversation with Mrs. King that day? A. Any— Nothing more than I just asked her to come in the office for a couple of minutes.

Q. Did she reply? A. She said she wasn't going to come in without somebody else with her.

Q. Did you make any statement to them then? A. Yes. That was the 16th, wasn't it?

Q. Yes. A. Yes. That was the last day they was in.

Q. Yes. A. Well, I said to them this, these two downstairs—

Q. These two are Mulford and King, right? A. Mulford and King was downstairs. And I said, "Now, listen, girls, there has been enough funny business for this past [481] week. You made up your minds now. You either go to work or else you'll have to take—if you go out that door I'll consider you have abandoned your job." And they went out.

Q. Now, did they make any reply to that before they went out? A. They didn't say nothing anywhere I could hear it, but they mumbled something after they got in the next entrance.

Q. But you couldn't tell what it was? A. I couldn't tell you what they said.

Q. And they left the plant? A. That's right.

Q. I see. Now, have you talked to Mrs. King or Mrs. Mulford since that time? A. No. They never come around.

Q. Now, I believe you testified that on that morning, which would be the 16th, that Mrs. Cochran, she went to work? A. She went to work. Right.

Q. Now, did you have any other conversation with her later that day? A. Yeah. I don't know just what all took place.

Q. Well, I just want to know what contact you had. A. Well, she kind of just come a flying in my office at noon hour.

Q. All right. What did she say? A. And she said that my son had fired her.

[482] Q. Yes. A. And she wanted either me to fire her or a layoff slip or something.

Q. Yes. A. And I said, "We're not giving out any. And you're not fired." And then she got mad and flew up and said that I didn't have enough sense to run a business or any of the family. That's what she said.

Q. Yes. Did you make any— A. And so I— You want to know what I said to her?

Q. Yes. A. I said to her, "Are you the ones that run the business across from the old factory, you and your husband?" And she said, "Yes." I said, "Well, then why aren't you still in business." And that made her mad. And she went out by the door, office door. And she slammed it. I thought it was going to fall through, the partition and all. And she said, on the outside there, I don't know what— These girls know more about what she said out there.

Q. I just want to know what you know. I don't want you talking about these girls. A. She said plenty. I'll say that.

Q. Did you hear any of it? A. I heard it, but I was kind of mad myself. Whenever somebody slams the door like that it gets my temper riled up.

[483] Q. Are you able to tell now what she said after she went out the door and slammed it or do you know of your own knowledge? A. Just offhand I'll let the other's stand. Because it was something similar to it. I can say that.

Q. All right. Now, did Mrs. Cochran stay at the plant or leave or do you know? A. She left. She left after she got a little bit over her mad spell.

Q. All right. Did you have any further conversations with her? A. No, never had any.

You didn't talk to her any more? A. No.

Q. Did you hear her say anything to anybody else? A. The only thing I heard was the office girl said she called.

Q. No. No. I don't want you to tell what the office girl told you. I want you to tell what you heard Mrs. Cochran say, if anything. A. I never heard her say anything because she was gone.

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By Mr. Jenkins:

Q. Mr. Gerlach, you have told us about these conversations which you had with Mrs. King and Cochran and Mulford between October the 10th and the 16th, 1969. Since the conversation you reported on the 16th, Thursday, do you recall, have you ever talked to either of the three of them since that time? A. No.

Q. Now, there has been testimony in this case relative to a telephone conversation between Katherin Stephens, who works in the office, and Mrs. Cochran on the afternoon of the 16th, on the telephone. Did you give any instructions with respect to that conversation to Mrs. Stephens? A. No, sir.

Q. You didn't tell her what to say? You didn't tell her what to say? A. No. I didn't know about it.

Q. Did you ever tell anyone, or make the statement to anyone that King or Mulford or Cochran had been fired by the company? A. No. Never. Because I never fired them.

Q. I see. Now, there has been some testimony in this case by Mr. Goolst that on or about January 21, 1970, he says he had a conversation with you and you said something to the effect [485] that you would not take the three girls back. Did you ever have such a conversation? A. I never. I would always take them back from the first time they refused to go upstairs if they'd of went.

Q. Did you ever tell Mr. Goolst that you would not take them back? A. Never.

Q. Did you ever tell Mrs. Wiley or any of the other union representatives? A. No, I never told them.

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Cross-Examination

By Mr. Gravitt:

Q. Mr. Gerlach, on October the 10th, I believe you testified that you told King that she could go back to work and she went back to work, is that right? A. Right. Right.

Q. And then Mulford was down there, too. And then you told Mulford to go back to work? A. I told both of them at the same time.

Q. You told both of them at the same time? A. Right. [486] Q. And both of them went back to work? A. Uh-huh.

Q. And you told King that you wanted to talk to her alone and she refused without Mulford going in the office with her, is that right, sir? A. That's right.

Q. Now, as I understand it after October the 10th, say October the 13th, that would be the Monday after that— A. Uh-huh.

Q. King came back again. And this time Mulford with her? A. Cochran with her.

Q. Well, Cochran with her. All right, sir. And at this time you don't permit King to go to work. Now, isn't that right, sir? A. No. No. Now, don't put words in my mouth.

Q. No, sir. No, sir. I don't want to. You keep me straight now. Did you tell King on this occasion that just go on upstairs— A. You heard my testimony a few minutes ago. You get it word for word that I give a little while ago.

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By Mr. Gravitt:

Q. Now, on October the 13th did you tell King that she could go on upstairs and go to work? A. The 13th? No. I said I had to talk to her a couple of minutes first.

Q. Yes. A. Then she could.

Q. Yes. A. Because I had to tell her.

Q. And at no time after October the 13th have you told King that she could go upstairs and go to work? A. Every morning. Every morning they was told. Every morning they come in.

Q. Now, after October the 13th did you tell King she could go upstairs and go to work? [488] A. After the 13th?

Q. Yes. A. Yes. The 14th, 15th, 16th.

Q. Well, what did you tell her then? Just tell me. A. I told her I had to talk to her a couple of minutes. Now, that— Is there anything wrong with that?

Q. And then she could go to work? A. Yeah. That's right. She'd always been coming in. She'd always been coming into my office any time she wanted to.

Q. She couldn't go to work, or you wouldn't let her go to work until she talked to you a few minutes, right? A. I had, I had some personal—

Trial Examiner: Please answer the question. She couldn't go to work unless you talked to her first. I'm not saying that's true. I am asking you if it's true.

The Witness: That's right. That's right.

Trial Examiner: All right. Go on to your next question.

By Mr. Gravitt:

Q. And then was it October the 13th that Cochran and King sat outside your office or near or about all day? A. They stayed in the lunch room.

Q. And you still never talked to them any time, did you? A. I talked to them that morning and offered them their jobs.

[489] Q. Yes. A. What else could I do?

Q. You never scheduled any meetings with King and Cochran or King and Mulford at any time to discuss this matter, did you? A. There wasn't anything to discuss. She just said she wasn't going to go to work unless the two of them come into my office and talked to me. That's what it was all about. I couldn't change the rules of the company to have two coming in whenever we'd never had.

Mr. Gravitt: No more questions.

Mr. Rubenstein: I have a few.

CROSS-EXAMINATION

By Mr. Rubenstein:

Q. On the 14th— I'm sorry. Strike that. On October the 14th, and we are now talking about the Tuesday morning, this was Mrs. King and Mrs. Cochran? A. Right.

Q. That were together? A. Right.

Q. Now, isn't it true that at that time you said to Mrs. Cochran that you are suspended for two days for leaving your station? A. No, no.

Q. You never did say that? A. That's not true.

[490] Q. That's not true? A. No, sir. I never have.

Q. Now, you have, however— A. She wasn't suspended. She wasn't suspended.

Q. But you had pulled her card by that time? A. By her not attending her job the day before.

Q. By Tuesday? A. Yes. Her card was pulled.

Q. Now, her job was not pulled on Monday, was it? A. No, it wasn't pulled on Monday.

Q. It was pulled on Tuesday? A. It was pulled Monday so she couldn't go to work Tuesday unless she talked to me.

Q. Now, we're talking about Mrs. Cochran now? A. Yeah.

Q. Now Mrs. Cochran had to talk to you, too, is that it, before she— A. Well, if anybody wouldn't take their job what would you do? You expect to just let them go up and go to work the next day without asking them why they wouldn't take their job?

Q. Now, what I am trying to find out is you did not permit Mrs. Cochran to go to work on the 14th, did you? A. Yes. Her card was offered to her.

Q. Now, wait a minute. You just said— A. Her card was offered on the 14th, the 13th. She was in there. And they [491] refused on the 13th, both of them. And they stayed in the factory all the day on the 13th.

Q. And then the night of the 13th Mrs. Cochran's card was pulled? A. It was pulled because she didn't go to work on Monday. She— The rack is cleared on Monday afternoon because if somebody stays out the card comes to the office. And they pick their cards up in the office and take them up the next day.

Q. Now, of course Mrs. King's card had been pulled Friday night? A. Well, I don't know. I would say it was pulled sometime Friday.

Q. Yes. A. Friday evening or sometime.

Q. And you are saying that you did not tell Mrs. Cochran that she was suspended for two days? A. No, sir.

Q. For leaving her station? A. No, sir. No, sir. Don't let her tell you that.

Q. Well, she told all of us that.

Trial Examiner: The answer is no?

The Witness: No.

By Mr. Rubenstein:

Q. She told all of us that. And then on the next day—

Trial Examiner: Is this the 15th now?

[492] Mr. Rubenstein: I am now talking about the 15th.

By Mr. Rubenstein:

Q. This is the day you said Mrs. Mulford was there as well as— A. All three of them.

Q. All three of them? A. All three of them.

Q. And Mrs. Mulford had just come off her two days suspension, is that correct? A. Right. Right.

Q. That she testified to? A. Right.

Q. That you instructed your wife— A. Right. Right.

Q. Okay. And then you offered her her card? A. I offered her— I brought all three of the cards out and offered the two that could go upstairs and told Catherine I still wanted to talk to her. And Mulford took her card.

Q. Mulford took her card? A. Took her card and worked that day.

Q. We are talking about the 15th. Mulford took her card? A. Yeah. On the 15th Mulford took her card and worked that day.

Q. And didn't Mulford also ask you on that day that as to what is the story with Mrs. Cochran and you said she still has [493] another day for suspension? A. Now, there wasn't no asking done.

Q. There was no asking done? A. That's right. All that was said, I had the cards and brought them out there.

And I give them to, out where they could get them. And Mulford took hers when I offered hers.

Q. You offered all three of them? A. I offered all but Catherine's. And I still had hers in my hands.

Q. I see. A. Because I wanted her in the office to talk some certain things I felt was interesting to her as well as to myself.

Q. Okay. And you offered Mrs. Mulford her card and without any words she took her card and went upstairs? A. That's right. You're right.

Q. Never asked what the other two girls were doing there? A. Never. She just walked right on.

Q. Just walked right on? A. That's right.

Q. And then you offered Mrs. Cochran her card? And she refused and said she had to stay with Catherine King? A. Uh-huh. That's right.

Q. And of course it was known that Catherine was not getting her card until she talked with you? A. That's right. I had her card. I said, "Here. I want [494] to talk to you a few minutes before you go upstairs."

Q. You stated, I believe, that there was a company rule about two people couldn't be in your office? A. No. No.

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By Mr. Rubenstein:

Q. So you deny then that Mrs. Cochran was suspended on the 14th and 15th? A. I told you what took place. Each one.

Q. Now, the 16th, the morning of the 16th or the afternoon of the 16th—I'm sorry. The morning of the 16th it was Mrs. Mulford who was back with Mrs. King? A. They were all three there.

Q. All three there? A. Yeah.

Q. Then what happened that morning? A. I offered the cards. And who takes their card? Cochran took her card. Mulford said she was going to stay with Catherine King.

Q. And so Mrs. Cochran went upstairs and she went to work? A. She went to work and worked till noon.

[495] Q. And worked until noon. And were you aware that her husband—that your son—I'm sorry. Are you aware that your son then that afternoon pulled her card and would not let her work the rest of that afternoon? A. I think they had an argument. There is a reason for it.

Q. Well, that's not what I asked you. I asked if you were aware of it? A. I wasn't aware of it until she come up and said he fired her. That's when I knew what had taken place.

Q. All right. Now, you learned then what had taken place from Mrs. Cochran when she said you son fired her? A. She said she's fired. She wanted a slip with something on it.

Q. And did you know at that point whether your son had fired her or had not fired her? A. In the meantime he came to the office and told me what took place.

Q. What did he tell you took place? A. Well, that she just simply pushed him, pushed these papers she had in his face when he had a time schedule to meet and he had told her very politely that if she would just wait until Monday that he would gladly take up these grievances and so on.

Q. All right. [496] A. But the question was was she the one to bring those grievances. We didn't know that. We had never been officially notified.

Q. Now, you claim that the company had not been officially notified— A. Right.

Q. —that— A. Right.

Q. —that Mrs. Cochran was an assistant steward? A. That's right.

Q. Had you ever been notified that Virginia Holland was the steward? A. Yeah. This came up.

Q. How were you notified? A. They bruoght her in to my son and talked it over.

Q. And weren't you aware that at the very same meeting that Mrs. Holland was elected as steward that Mrs. Cochran

was elected to be assistant steward? A. I heard one of the witnesses say this morning that she wasn't. And that's all I know about it.

Mr. Jenkins: That's right.

By Mr. Rubenstein:

Q. You are saying it didn't happen? A. I heard a witness say this morning that she wasn't, that she wasn't elected.

[497] Q. What witness said that this morning?

Trial Examiner: Well, we will not go into that.

The Witness: I don't know. I'm not going to mention it. But I heard it and you heard it, too.

By Mr. Rubenstein:

Q. Now, that was the witness who said she never attended any meetings and so she wasn't there? A. No, that wasn't either. That was one that attended every one.

Q. So—

Trial Examiner: Let's not comment on any witness' testimony.

By Mr. Rubenstein:

Q. So you say that you are not aware of the fact that Mrs. Cochran had anything to do with grievances? A. We knew she was secretary and that's all we knew.

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Q. Right. And how about Mrs. Mulford? Did you know what she was? A. She'd never been presented to the company either.

Q. Had never been presented to the company? A. No. No.

Q. What do you mean by "presented"? Do you mean— A. Just the way that Virginia should have been presented. We thought if there was any changes they'd of brought them in the same way.

[498] Q. That's not really my question. Did you know that she was the steward? A. We didn't,

Q. Or the assistant? A. We had never been officially notified.

Q. That again was not my question. Did you know?

Trial Examiner: Did you somehow know?

The Witness: Just the grapevine is all.

Trial Examiner: All right.

By Mr. Rubenstein:

Q. Then you knew that when Mrs. Mulford was there with Mrs. King on the morning, on the afternoon of the 10th and the morning of the 13th and on the morning of the 16th that she was the steward? A. No, I didn't know it.

Q. You didn't know it? A. No.

Q. And you just thought that she was some busy-body? A. I just figured she'd come down with her. Because I knew Virginia had resigned. I didn't know it.

Q. And Virginia, of course, had resigned about two months before this? A. Now, no, I don't think so.

Q. Do you know when she resigned? A. No.

[499] Q. Well, how do you know— A. It hadn't been very long. It hadn't seemed very long.

Q. I see. Well, suppose that—Strike that. So you are saying that although you knew through the grapevine that Mrs. Mulford was the steward you didn't recognize her as such when she came into the office there on the 10th? A. She didn't say she was such. She never said she was such.

Q. And don't you recall Mrs. Wiley bringing Mrs. Mulford in after Mrs. Holland resigned— A. Nah.

Q. —and tell you and all of you that she was the new steward? A. No. Don't feed us this. Because it wasn't done.

Q. It wasn't done? A. No.

Q. All right, sir. And you don't recall the meeting that

took place in your cafeteria in the lunch room at which Mrs. Wiley was there and Mr. Bananno was there and Mrs. Mulford was there and that took place, and Mrs. Cochran, and then you went from that meeting into your office and they went into your office and told you that Mrs. Mulford had replaced— A. No. You're wrong.

[500] Q. We're wrong? Okay. Didn't happen? A. Didn't happen that way.

Q. But the whole thing never happened? A. Part of it happened.

Q. Never— A. Part of it happened and part of it didn't.

Q. Well, which part happened? A. What?

Q. Which part happened? A. We settled a grievance, the whole bunch of us together. But one had just as much say as the other. There wasn't no individual.

Q. Now, who settled the grievance? A. It wasn't even a written grievance to tell you the truth about it.

Q. I understand. But who settled it? Who was there at this grievance session? A. That guy right there (Pointing) was there. And he was the one that settled it. He was the one that settled it.

Q. Mr. Goolst was there, wasn't he? A. That's right.

Q. And you knew who Mr. Goolst was? A. That's right. But these others was committees and so on. And they wasn't, they wasn't—You ask him. He'll tell you. There wasn't any of that there done.

[501] Q. As a matter of fact, Mr. Goolst wasn't even present? A. You guys don't understand one another for some reason or the other.

Q. Now, suppose I tell you that the man you are talking about, Mr. Goolst, wasn't present?

Mr. Jenkins: I don't want him telling him anything.

The Witness: No. I take it back. It wasn't him. It wasn't him.

Trial Examiner: Wait a minute. Wait a minute. Keep quiet, please. I have to make a ruling.

The Witness: Okay.

Trial Examiner: I'll sustain Mr. Jenkins' objection.

Mr. Rubenstein: All right.

Trial Examiner: I don't want you to get into any arguments with him. Please wait until the question is finished. Give your lawyer a chance to object to it if he wants to.

The Witness: Bananza was the other guy.

Mr. Jenkins: Mr. Gerlach, the Trial Examiner is giving you some instructions. Would you please look at him and listen to what he has to say?

The Witness: Okay.

Trial Examiner: You wait until the question is finished and then wait a little while longer in case Mr. Jenkins has an objection.

The Witness: Okay.

[502] Trial Examiner: Then just answer the question and don't make any speeches, please.

The Witness: Okay.

Trial Examiner: I'm not criticizing you. I'm just making a ruling.

By Mr. Rubenstein:

Q. Now, tell us, at this grievance meeting who was present to the best of your recollection? A. Just to tell the truth about it I, since you just mentioned it, I remember a fellow. The name sounded like Bandando. He was there.

Q. Mr. Bananno. A. And then some of the girls in the factory. But just who all it was I couldn't tell you everyone probably.

Q. Well, was— A. There was one of them there I know.

Q. What? A. I think Alice—

Q. Excuse me. A. I think Alice was there.

Q. Right. And Delila was there? A. I couldn't tell you about whether she was there or not.

Q. And Martha was there? A. I couldn't tell you whether she was there or not.

Q. And as a matter of fact those were the three girls that were there? That was Mr. Bananno and Mrs. Wiley— [503] A. I'll say Alice was there. Because she done some talking. And I remember her.

Q. And that meeting was around the end of August or the first of September, wasn't it? A. Couldn't tell you just when.

Q. You don't know? A. Just don't.

Q. Well, do you recall when Mrs. Holland left the steward job? Wasn't it after that? Mrs. Holland? A. I can't tell you.

Trial Examiner: It doesn't matter. This is on the question of knowledge.

Mr. Rubenstein: Personal knowledge.

Trial Examiner: We are not going into what was discussed. You see, I know why you're bringing it out. And that's why I say I don't care when it occurred. And I'm not inferring that he has knowledge. I'm just saying that it doesn't matter.

By Mr. Rubenstein:

Q. Now, at this meeting did not Delila Mulford ask you for the seniority list? Do you recall that? A. She asked me one time for that. But whether it was that meeting or not I couldn't tell you.

Q. And when she asked you for the seniority list didn't she tell you that she was the steward and that that's why she [504] was now asking you for the seniority list? A. No. No. Not that I know of.

Q. You just thought— A. Not that I remember.

Q. Would any employee just come up and ask you for a seniority list? A. They will in our place. It's open.

Q. I see. A. It's not closed.

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Joel Goolst

was recalled as a witness by and on behalf of the Charging Party and, after being reminded he was under oath, was examined and testified further as follows:

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DIRECT EXAMINATION

By Mr. Rubenstein:

Q. Mr. Goolst, in connection with your official position in connection with the International Ladies' Garment Workers did you attend the meeting in April of the local at which elections took place, the steward elections? A. Yes, sir.

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By Mr. Rubenstein:

Q. Thereafter did you make it known, the results of that [506] election, to anybody, to either Mrs. Gerlach, Mrs. Gerlach or Gerlach, Jr.? A. Gerlach, Jr.

Q. And what did you tell him? A. That Virginia Holland was elected chair lady and he will be dealing with Virginia Holland in the factory and that Martha Cochran has been appointed her assistant.

Q. And when that approximately with reference to the signing of the agreement? A. The day we brought the agreement in and brought the strikers back to work. That's when that took place. Both Mr. Gerlach, Jr. and myself, in order to bring all parties together, made a speech that day. At that time we told him who would be dealing with in the factory.

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Elizabeth Wiley

was called as a witness by and on behalf of the Charging Party, was examined, and testified further as follows:

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DIRECT EXAMINATION

By Mr. Rubenstein:

Q. Mrs. Wiley, in connection with your position as business agent, International Ladies' Garment Workers' Union, did you have a meeting on the company premises around the latter part of August, 1969? A. Yes, sir; we did.

[508] Q. And who was present at that meeting? A. Mr. Nick Bananno, who is the assistant manager of the upper South Department, at that time, myself, Martha Cochran, Alice Hoschar, and Delila Mulford.

Q. And— A. And Mr. and Mrs. Gerlach, Sr.

Q. Now, at that meeting was there any discussion of shop steward? A. Yes, sir; there was.

Q. Would you tell us? A. The discussion was that since Virginia Holland has resigned her position as chair lady that we informed the company, Mr. and Mrs. Gerlach, that there had been a new chair lady elected, who was Delila, and—

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Q. That's Delila Mulford? A. Correct. And that Martha Cochran was still the assistant in case Delila should be out for some unkonwn reason, you know, we would still have some representation in the shop.

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Charging Party's Exhibit No. 1

AGREEMENT BETWEEN
QUALITY MANUFACTURING COMPANY
Point Pleasant, W. Va.
and
UPPER SOUTH DEPARTMENT
of the
INTERNATIONAL LADIES' GARMENT WORKERS UNION
Baltimore, Maryland

[UNION LABEL]

April 15, 1969

International Ladies' Garment Workers Union

Huntington, W. Va. Phone 523-0561

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[1] AGREEMENT

THIS AGREEMENT made and entered into this 15th day of April, 1969, by and between QUALITY MANUFACTURING COMPANY, for its plant at Point Pleasant, West Virginia, hereinafter designated as the "Employer", and the UPPER SOUTH DEPARTMENT OF THE INTERNATIONAL LADIES' GARMENT WORKERS' UNION, said agency being an unincorporated association and hereinafter designated as the "Union", for and in behalf of itself and the employees now employed or hereinafter to be employed by the Employer.

WITNESSETH:

WHEREAS, the Employer represents that it is engaged in the making of dresses, and other women's wear, and

WHEREAS, the workers employed by the Employer have duly designated the Union as their exclusive bargaining representative for the purpose of collective bargaining with

the Employer with respect to rates of pay, wages, hours, and other conditions of employment, and

WHEREAS, the parties desire to cooperate in establishing conditions which will tend to secure a living wage, improved working conditions and fair competition insofar as labor cost is concerned, and to provide methods for a fair and peaceful adjustment of all disputes that may arise between the parties.

NOW THEREFORE, in consideration of the mutual promises [2] and obligations herein assumed and contained and other good and valuable considerations, the parties agree as follows:

ARTICLE I

Union Recognition

The bargaining unit covered by this agreement consists of all non-supervisory production workers, including packing, shipping and cutting workers employed by the Employer. It is agreed that the Union represents a majority of such workers and that it shall be the sole and exclusive bargaining representative for all workers in the bargaining unit during the entire period of this agreement. Neither the Employer nor any of its agents shall directly or indirectly discourage membership in the Union.

ARTICLE II

Union Membership

The Union agrees that it will accept into membership employees regularly hired by the Employer and that it will not force any unusual requirements for their admission to membership in the Union.

Good standing membership to the Union shall be a condition of employment. All employees after completion of their Trial Period shall automatically become union members.

ARTICLE III

Trial Period

[3] Newly hired workers shall be deemed during their first sixteen (16) weeks of employment to be engaged for a trial period. Thereafter they shall be deemed regular employees and entitled to all the benefits of regular employees under this agreement.

ARTICLE IV

Check-Off

The Employer agrees to deduct membership dues (which shall be deemed to include periodic fixed dues, initiation fees, and assessments) from the earnings of its employees as directed by the Union and transmit the same to the Union within forty-eight (48) hours after each pay period, subject to the requirements of law concerning authorization and assignment by the workers individually.

ARTICLE V

Hours - Overtime

The standard hours of employment shall be forty (40) hours per week divided equally into the first five (5) working days from Monday through Friday inclusive. All work outside the daily regular hours shall be considered overtime and shall be paid for at the rate of time and one-half Saturday work as such shall be considered overtime and shall be paid for at the rate of time and one-half unless employee is absent on her own.

ARTICLE VI

Minimum Wage Scale

Minimum hourly wage rates for employees covered by this Agreement are set forth in Schedule "A" annexed hereto.

ARTICLE VI

Minimum Wage Scale

Minimum hourly wage rates for employees covered by this Agreement are set forth in Schedule "A" annexed hereto.

[4] ARTICLE VII

Discharges and Discipline

No worker shall be discharged or otherwise disciplined without good and sufficient cause, except during his trial period. In case of any dispute regarding a discharge or disciplinary act and if the discharge or disciplinary act is found to be unjustified, the worker shall be reinstated and shall be compensated for the loss of his earnings during the period of such discharge or disciplinary act.

ARTICLE VIII

Seniority

All layoffs and rehiring shall be by seniority, by craft and by the type of operation performed, it being understood that the worker remaining on the job shall have the experience and ability to perform the work required. The Shop Chairman shall have top seniority provided there is work available which she is competent to perform.

ARTICLE IX

Chairlady, Committee

There shall be a Shop Chairlady and Committee selected by or under the auspices of the Union. The Shop Chairlady shall be compensated for time unavoidably lost during working hours in the process of adjusting grievances.

Article X

Damaged Goods

The Employer shall not charge workers for damage to material unless caused willfully.

[5]

Article XI

Assignment to Other Work

1. The Company agrees that if employees are assigned to operations which they are not familiar with that they shall be compensated for the time worked on such work.

2. It is also agreed that any worker who is switched to more than three operations in any one day shall be paid no less than their previous work average for said day's work.

3. The employee has the right to refuse to do operations other than their regular work.

Article XII

Holidays

The following holidays shall be observed and all employees who are eligible shall be paid for them regardless of whether such holidays fall on a working or non-working day of the week:

1969: Labor Day
Christmas Day
1970: Memorial Day
1971: July 4th
For a total of 4.

Employees shall be eligible for holiday pay after sixteen (16) weeks of employment.

An employee shall be ineligible for holiday pay, if while work is available, he fails to work the day before or the day after the holiday unless such absence is for justifiable cause.

[6] Holiday pay for each time an dpiece worker shall be the number of hours in the regular work day at plant minimum.

In the event any work is performed on any of the above holidays, the employees shall be paid at the rate of time and one-half, in addition to pay for the holiday.

If a holiday falls during a vacation period, employees will get an additional day with pay.

Article XIII

Right to Leave Shop—Call In Time

Workers shall not be required unreasonably to remain in the shop during the day when there is no work for them. All workers who are requested or permitted to report for work shall be supplied with at least one-half (½) day's continuous work or be paid therefor.

Article XIV

Health, Welfare, Retirement and Severance Fund

1. Effective April 15, 1969, the Employer shall pay monthly to the Union a sum of two and one-half (2½) percent of its total gross weekly payroll (before deduction for Federal or State taxes) of all employees covered by this agreement whether regular workers, employed by the Employer. April 15, 1970, an additional one-half (½) percent to be paid and again April 15, 1971 another one-half (½) percent making a total of three and one-half (3½) percent. Such payments shall be made toward the Upper South Department, ILGWU, Health, Welfare, Retire- [7] ment and Severance Fund, a trust fund established by collective agreement prior to January 1, 1946, and maintained by the Union in trust for the purpose of providing the employees with health and welfare benefits and services.

The payments made hereunder by the Employer shall not constitute or be deemed wages due to the workers.

2. The above said Funds shall continue to be maintained and administered by the Union in accordance with the by-laws or rules and regulations adopted by the Union for that purpose. The Employer shall have no legal or equitable right, title or interest in, or claim against, his or any other Employer's payments toward the Said Funds, except as may be provided by the by-laws or rules and regulations of said Fund.

Article XV

Assurance of Work—Employer Expansion

1. The Employer shall have no work performed outside of its own shop unless the workers of its inside shop are fully supplied with work, and unless such outside shop is under contract with a local union of the International Ladies' Garment Workers' Union and has complied with the terms thereof, is registered by the Employer herein with this Union and maintains the standard of wages and hours established under the agreement herein. In addition, the Employer herein shall be responsible to the Employees of such outside shop for their wages if they are not. [8] paid for the work done by them on garments of the Employer; said responsibility shall be limited to two (2) weeks' wages.

2. Should the Employer desire to expand and open additional factories, notice thereof shall be given by said Employer to the Union prior to the opening of such factories and such factories shall be operated under all the terms and conditions of this agreement. In no case, however, shall the operation of such factories result in reducing the work or the number of workers at present employed in the factories to which this agreement is now applicable.

Article XVI

Struck Work

The Employer shall not perform any work for or give any work to any concern against which a strike has been

declared by the ILGWU or any of its affiliated locals, and in no event shall it request any of its employees to perform work destined directly or indirectly for such concern. Such work shall not be deemed in the workers' regular course of employment, and the workers need not perform such work.

Article XVII

Rehiring After Lay-Off

If the Employer suspends work in whole or in part during the slow season, it shall upon resuming work give employment to the employees it has laid off before engaging any new help.

[9]

Article XVIII

Examination of Books

The Employer shall, upon request by the Union, submit the payroll books and other pertinent records for examination for the purpose of ascertaining whether the Employer has complied with the terms of this agreement.

Article XIX

Access to Shop

Representatives of the Union shall have access to the shop including the sewing floor of the Employer during business hours for the purpose of taking up complaints and for the purpose of ascertaining whether the terms of this agreement are being complied with, provided the representative makes his presence known at the Employer's office.

Article XX

Authorization

The Employer agrees that the sole persons authorized or having the power to act as agent of the Union, or to bind the Union legally with respect to matters arising out of this

agreement or arising out of the relations between the Employer and the Union, or to subject the Union to any liability whatever by reason of any act or omission are the Manager of the Union and the designated business agent servicing the shop, or such substitute or additional persons as the Union may hereafter formally designate by written notice to the Employer). The Union shall not be responsible for the acts or omissions of any [10] other persons, including members and employees of the Union.

Article XXI

Crossing Picket Line

It shall not be considered a breach of this agreement on the part of the Union or on the part of any individual employee if any employee or employees refuse to cross a picket line, recognized by the International Ladies' Garment Workers' Union, nor shall such refusal be cause for discharge or discipline.

Article XXII

No-Strike, No-Lockout Pledges

The Union agrees that it will not call, authorize or ratify a strike or stoppage during the life of this agreement, except for the Employer's failure to submit to arbitration or to comply with the decision of an arbitrator. Should an unauthorized strike or stoppage of work by Union members occur, the Union's sole obligation shall be to endeavor in good faith, within twenty-four (24) hours after receipt of written notice thereof from the Employer, to bring about the return to their work of its members who have stopped work. Upon the failure of any employees to return to work within said twenty-four (24) hours period, the Employer may at its option consider that such employees have abandoned their employment; but should the Employer reemploy such employees, it shall treat all such employees alike and shall not discriminate among them. Compliance by the

Union in good faith with this provision shall be deemed full compliance with the Union's obligation hereunder.

[11] The Employer agrees that it will not order, authorize or ratify a lockout during the life of this agreement. Should a lockout occur, the Employer's sole obligation shall be to endeavor in good faith, within twenty-four (24) hours after receipt of written notice thereof from the Union, to terminate the lockout and reemploy the employees. Upon the failure of the Employer to do so within said twenty-four (24) hour period, the Union at its option may treat the matter as a dispute to be determined under the machinery for adjustment of disputes, as provided in this agreement, or may consider that the Employer has forfeited its right under the agreement.

Article XXIII

Adjustment Machinery—Court Actions Barred

1. Any and all disputes, complaints, controversies, claims or grievances whatsoever between the Union or any employees and the Employer, which directly or indirectly arise under, out of, or in connection with or in any manner relate to this agreement of the breach thereof, or the acts, conduct or relations between the parties shall be adjusted as follows:

(a) The Shop Chairlady, or in the case of piece price disputes, the Price Committee, together with a representative of the Union, shall attempt to settle the matter with a represenative of the Employer. No adjustment shall be deemed binding on [12] the Union unless approved by an authorized representative thereof.

(b) If they shall fail satisfactorily to dispose of any such dispute, complaint, controversy, claim or grievance, or if for any reason it has not been taken up by them, or if the matter does not lend itself to the foregoing procedure, the matter shall be submitted to arbitration before an arbi-

trator agreed on by the parties. If the parties cannot agree on an arbitrator within five (5) days, then upon request of either party the American Arbitration Association shall designate the arbitrator and the arbitration shall be conducted in accordance with their rules. The award or decision of the arbitrator, in addition to granting such other relief as the arbitrator may deem proper, may contain provisions commanding or restraining acts and conduct of the parties. Any award or decision of the arbitrator shall be final and binding and shall be enforceable by appropriate proceedings in law or in equity. The taking of the oath by the arbitrator is hereby expressly waived. His fee shall be borne equally by the parties hereto.

2. It is the intention and agreement of the parties that the procedure herein established for the adjustment of disputes shall be the exclusive means for the termination of all disputes, complaints, controversies, claims or grievances whatsoever, including claims based upon any breach of this agreement. It is intended that this provision shall be interpreted as broadly and inclusively as possible. Neither party shall institute any [13] action or proceeding in a court of law or equity, state or federal, other than to compel arbitration, as provided in this agreement, or to enforce the award of an arbitrator. This provision shall be a complete defense to any action of proceeding instituted contrary to this agreement.

Article XXIV

Vacations

All employees covered by the agreement employed for a period of one (1) year as of June 1st of each year and who has worked at least 1200 hours and are on the payroll at vacation time shall receive one (1) week's vacation with pay. Vacation shall be paid at the employees average but in no event less than plant minimum. The Employer shall designate the vacation period between June 15 and August 15—Christmas week off without pay except for holiday pay.

Article XXV

Conformity to Law—Saving Clause

1. If any provision or the enforcement or performance of any provision of this agreement is or shall at any time be contrary to law, then such provision shall not be applicable or enforced or performed, except to the extent permitted by law. If at any time thereafter such provision or its enforcement or performance shall not longer conflict with the law, then it shall be deemed restored in full force and effect as if it had never been in conflict with the law.

[14] 2. If any provision of this agreement or the application of such provision to any person or circumstance shall be held invalid, the remainder of this agreement, or the application of such provision to other persons or circumstances, shall not be affected thereby.

Article XXVI

Supervisors

Supervisors shall not perform the work of a craft covered by the agreement except in emergencies and for the purpose of instruction. At no time can this take work away from an employee covered by crafts in this agreement.

Article XXVII

Term

This agreement shall go into effect as of the 15th day of April, 1969, and shall continue in effect until the 15th day of April, 1972, and shall thereafter automatically be renewed from year to year unless either party shall notify the other party inwriting at least sixty (60) days prior to any such expiration date that it desires to change or modify the terms thereof.

In Witness Whereof, the parties have hereunto set their respective hands and seals, and caused this agreement to be

signed by their respective officers the day and year first above written.

WITNESS:

L. Gerlach, Jr.
Joel Goolst

QUALITY MANUFACTURING COMPANY
L. R. Gerlach, Sr.

UPPER SOUTH DEPARTMENT OF THE INTERNATIONAL LADIES' GARMENT WORKER'S UNION

Angela Bambace

[16] QUALITY MANUFACTURING COMPANY

SCHEDULE "A"

Minimums:

Effective April 15, 1969 — $1.65 per hour
Effective April 15, 1970 — 1.70 per hour
Effective April 15, 1971 — 1.75 per hour

Effective April 15, 1969, the percentage increase is to be increased from the present twenty-five (25) percent to thirty-three and one-third (33⅓), percent.

Federal Minimum:

The Employer agrees that in the event of an increase in the Federal Minimum that the plant minimum shall be .05 above the plant minimum.

Cutting Department Schedule:

	4-15-69	4-15-70	4-15-71
Head Cutter	$2.40	$2.55	$2.70
Assistant Cutter	1.70	1.80	1.95
Scale to be worked out for newly hired cutters.			

Spreaders, Separaters, Utility and Service Time Workers	1.70	1.75	1.80
The employer agrees that the piece rate tickets will be increased in the following amounts on the above mentioned dates to compensate the increase in the plant minimum.	.03%	.03%	.03%

Piece Rate Yield

Piece rates shall be set to yield an operator of average skill and ability no less than the plant minimum at all times. The Employer agrees that if these rates do not yield the plant minimum then they will be adjusted.

WITNESS:

L. Gerlach, Jr.

Joel Goolst

QUALITY MANUFACTURING Co.

L. R. Gerlach, Sr.

INTERNATIONAL LADIES' WORKERS GARMENT UNION

Angela Bambace

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Department .....

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SUPREME COURT OF THE UNITED STATES

No. 73-765

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, UPPER SOUTH DEPARTMENT, AFL-CIO, *Petitioner*

v.

QUALITY MANUFACTURING COMPANY and NATIONAL LABOR RELATIONS BOARD

No. 73-1363

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

J. WEINGARTEN, INC.

Order Allowing Certiorari. Filed April 29, 1974

The petitions for writs of certiorari are granted and the cases are set for oral argument in tandem.

Supreme Court, U. S.
FILED
JAN 14 1974
MICHAEL RODAK, JR., CLERK

No. 73-765

In the Supreme Court of the United States

OCTOBER TERM, 1973

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, UPPER SOUTH DEPARTMENT, AFL-CIO, PETITIONER

v.

QUALITY MANUFACTURING COMPANY AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

PETER G. NASH,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-765

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, UPPER SOUTH DEPARTMENT, AFL-CIO, PETITIONER

v.

QUALITY MANUFACTURING COMPANY AND NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

The basic question presented is whether it is an unfair labor practice for an employer to discharge an employee for insisting that her union representative be present at an investigatory interview with the employer, which the employee reasonably believes will result in disciplinary action.[1] The Board (with one Member dissenting) held that the discharge consti-

[1] The petition is filed by the Union, the charging party before the Board, which had intervened in the court of appeals.

530-157—74——1

tuted an unfair labor practice, and entered an appropriate order (Pet. App. 1a–15a). As the Board explained in a subsequent case, *Mobil Oil Corp.*, 196 NLRB No. 144, 80 LRRM 1188, 1191:

> An employee's right to union representation upon request is based on Section 7 of the Act [29 U.S.C. 157] which guarantees the right of employees to act in concert for "mutual aid and protection." The denial of this right has a reasonable tendency to interfere with, restrain and coerce employees in violation of Section 8(a)(1) of the Act. Thus, it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy. * * *

The court of appeals reversed the Board's ruling on this question (Pet. App. 58a–71a).[2] While the court recognized that there is "no doubt that employees have a right to union representation * * * after a grievance has been filed" (Pet. App. 68a, n. 1), it held that the Board lacked authority to require the "employer to permit an employee to have a union representative present whenever the employee 'has reasonable ground to fear that the interview will adversely affect his continued employment, or even his working conditions'" (Pet. App. 70a).

[2] The court, however, did sustain the Board's further finding that the Company violated Section 8(a) (1) and (3) of the Act, 29 U.S.C. 158(a) (1) and (3), by discharging a union chairlady for seeking to file grievances based upon the earlier discipline for requesting union representation (Pet. App. 62a).

The Board believes that the decision of the court of appeals is erroneous.[3] Moreover, the issue whether the Act affords employees the right to have the assistance of their union representative at investigatory interviews which could adversely affect their employment conditions is an important and recurrent one in the administration of the Act (see Pet. 14, n. 5). The Board did not file a petition for a writ of certiorari in this case because it concluded that, in view of the relatively large number of Board cases already before the Court,[4] it should await a possible conflict of decisions before seeking review on the issue.

[3] The court's decision is in accord with that of two other circuits. *Mobil Oil Corp.* v. *National Labor Relations Board*, 482 F. 2d 842 (C.A. 7); *National Labor Relations Board* v. *J. Weingarten, Inc.*, 84 LRRM 2436 (C.A. 5).

[4] See *Golden State Bottling Co.* v. *National Labor Relations Board*, No. 72–702; *National Labor Relations Board* v. *Savair Mfg. Co.*, No. 72–1231; *National Labor Relations Board* v. *Bell Aerospace Co.*, No. 72–1598; *National Labor Relations Board* v. *The Magnavox Co. of Tennessee*, No. 72–1637; *National Labor Relations Board* v. *Food Store Employees Union, Local 347*, No. 73–370; *National Labor Relations Board* v. *Wichita Eagle & Beacon Publishing Co.*, No. 73–701; *National Labor Relations Board* v. *Int'l Bro. of Electrical Workers*, No. 73–795; *National Labor Relations Board* v. *Western Addition Community Organization*, No. 73–830.

Since the Union has filed a petition in this case, and the Board believes that the issue warrants further review, however, it does not oppose the granting of the Union's petition.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

JANUARY 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974

The respondent, Quality Manufacturing Company, did not file any formal brief in opposition to the petition.

Supreme Court, U. S.
FILED
JUN 27 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-765

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, UPPER SOUTH DEPARTMENT, AFL-CIO, *Petitioner*

v.

QUALITY MANUFACTURING COMPANY and NATIONAL LABOR RELATIONS BOARD

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-765

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, UPPER SOUTH DEPARTMENT, AFL-CIO, *Petitioner*

v.

QUALITY MANUFACTURING COMPANY and NATIONAL LABOR RELATIONS BOARD

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 481 F.2d 1018 (P. 58a-71a).[1] The opinion of the National Labor Relations Board is reported at 195 NLRB 197 (P. 1a-58a).

---

[1] The letter "P." refers to the petition for a writ of certiorari; the letter "A." refers to the single appendix before this Court.

JURISDICTION

The judgment of the Court of Appeals was entered on July 19, 1973 (P. 72a). On October 5, 1973, Mr. Chief Justice Warren E. Burger entered an order extending the time within which to file a petition for a writ of certiorari to December 17, 1973. The petition for a writ of certiorari, filed on November 12, 1973, was granted on April 29, 1974 (A. 200). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Act protects an employee and her fellow-employees who are her union representatives from discharge or other discipline by their employer where (1) the employer discharges the employee because she declines to submit to questioning by her employer which she reasonably believes may lead to disciplinary action against her unless she is accompanied by and has the assistance of her union representative at the interview, and (2) the employer suspends one union representative, and suspends and later discharges another union representative, because they seek to furnish the representation asked of them by their fellow-employee.

STATUTE INVOLVED

Section 7 of the National Labor Relations Act (29 U.S.C. § 151) accords employees *inter alia* "the right . . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce em-

ployees in the exercise of the rights guaranteed in section 7"; section 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in . . . employment to encourage or discourage membership in any labor organization . . ."; and section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees. . . ."

STATEMENT

I. The Findings

The findings of the National Labor Relations Board, affirmed by the Court of Appeals, may be summarized as follows:

Quality Manufacturing Company (the Company) is engaged in the manufacture of women's clothing at Point Pleasant, West Virginia (P. 2a, 19a; A.3, 8). Its owners and principal officers are Lawrence Gerlach, Sr., president; Mary Kathryn Gerlach, his wife and production manager; and Lawrence Gerlach, Jr., their son and general manager (P. 2a, 59a; A. 4, 8, 17, 68-69). The Union since 1968 has been the certified collective bargaining representative of the Company's production and maintenance employees (P. 20a, 59a; A. 4-5, 8). The agreement between the Company and the Union provides that "[t]here shall be a Shop Chairlady . . . selected by or under the auspices of the Union" (A. 189). In 1969 Delila Mulford was the Shop Chairlady (P. 23a, 59a; A. 24, 34, 45, 61-62, 185); Martha Cochran was Assistant Shop Chairlady and Secretary-Treasurer of the Union (P. 20a, 60a; A. 24, 33-34, 184-185); and Catherine King was a long-time employee of the Company (P. 2a, 59a; A. 70).

On October 16, 1969, the Company discharged Catherine King because she had refused to attend a conference at the Company's request without union representation in circumstances where she "had reasonable grounds to believe that disciplinary action might result from the Employer's investigation of her conduct" (P. 4a, 7a, 24a). On October 12, 1969, the Company had suspended shop chairlady Delila Mulford for two days, and on October 16, 1969, the Company discharged her, for her persistence "in seeking to represent King at the conference . . . [which the Company] requested" (P. 3a, 4a, 8a, 23a-24a). On October 14, 1969, the Company had suspended assistant shop chairlady Martha Cochran for two days for the same reason (P. 3a-4a, 8a, 21a). On October 16, 1969, the Company discharged Martha Cochran for "filing grievances on behalf of herself, Mulford, and King" (P. 4a, 9a, 22a).

The events which culminated in the suspensions and discharges began on the morning of Friday, October 10, 1969. On that morning shop chairlady Delila Mulford, employee Catherine King, and two other employees met with all three Gerlachs. At the meeting the employees complained that they could not make a satisfactory wage under the piece work system then in effect. The discussion ended with Gerlach, Jr., ordering Mulford to return to her work station and telling her "if [the employees] didn't like the way it was there in the company to go elsewhere." (P. 2a, 23a, 59a; A. 46, 53, 57-58, 73, 78.)

Later the same day, while on the production floor, Mrs. Gerlach noticed that King had shut down her machine, and was waving her arms and gesturing, causing some minor disturbance. Two other employees

had stopped their machines and were watching King. Mrs. Gerlach directed King to resume production, but King told her to "tend to your business." Thereupon Mrs. Gerlach ordered King to go to Mr. Gerlach's office. King did, but on her way to the office she asked shop chairlady Mulford to accompany her. Mrs. Gerlach warned Mulford that she "had no business down there," but Mulford left her work station and accompanied King to the anteroom of Mr. Gerlach's office. Mrs. Gerlach informed her husband of what had transpired. Mr. Gerlach told Mulford to return to her work station because "it wasn't a grievance and [they] didn't have any business with her." Mulford refused, replying that "Catherine paid her dues and she was entitled to [have me] be there," to which the Gerlachs rejoined that Mulford "was endangering . . . [her] job . . ." Mr. Gerlach ordered King to come into his office for a discussion but King replied that she would not without Mulford. Gerlach then told both King and Mulford to return to their work stations. They did. On Sunday, October 12, Mrs. Gerlach at her husband's request telephoned Mulford and informed her that she was suspended for two days. She gave no reason, but Mulford understood that it was because of her conduct in seeking to represent King on the previous Friday, as it was. (P. 2a-3a, 23a-24a, 59a-60a; A. 46-48, 55-56, 73-74, 75, 79-80, 82-83, 92, 126-127, 134, 137-138, 165, 173.)

The following Monday, October 13, King found upon reporting for work that her time card was not in the rack, indicating under plant practice that she was wanted in Mr. Gerlach's office. This time King asked Martha Cochran, the assistant shop chairlady, to accompany and represent her. Cochran went with

King without first "punching in" on her own time card. They met Mrs. Gerlach outside the office. She warned Cochran that "your time card is upstairs and my advice to you is to go upstairs and go to work if you want your job." She added that the Gerlachs wanted to talk only to King and "take up where we left off Friday." Cochran replied, "Well, Mrs. Gerlach, I'm sorry, but if that's what you want to talk to her about, that is union business and she has asked me to represent her," stating further that she was a union steward and that was her duty. Cochran and King then spoke to Mr. Gerlach and asked him if he was going to give King her time card. He said that he would not until King came into his office and talked to him in private. Cochran and King declined to accede to the request for an interview with King without union representation. They sat and waited in or near the office for the remainder of the day. In the meantime Cochran's card was also "pulled" from the rack. (P. 2a-3a, 20a-21a, 60a-61a; A. 25-27, 127-128, 167.)

The next morning, Tuesday, October 14, Cochran and King again went to Gerlach's office. They asked him if he was going to return King's time card. Gerlach again replied that he would not until King talked to him in private. Cochran asked about her own card. She was informed that she had been suspended for two days for being away from her work station the day before. King and Cochran left the plant. (P. 3a-4a, 21a, 61a; A. 28, 168.)

The next day, Wednesday, October 15, Mulford's two-day suspension ended. She went to Gerlach's office together with Cochran and King. They were met by the Gerlachs. Mulford inquired as to the status of Cochran and King. Mr. Gerlach replied that Cochran

was still under suspension for another day and that he would not give King her time card until she came into the office and talked to him in private. Cochran and King left. Mulford went to work. (P. 4a, 24a, 61a; A. 28-29, 48-51, 169.)

The following day, Thursday, October 16, Cochran's two-day suspension expired. She, Mulford and King went to the office and were again met by the Gerlachs. Mrs. Gerlach gave Cochran her time card and she went to work. Mrs. Gerlach then told King that Mr. Gerlach wanted to see her in the office alone. King asked, "With Delila [Mulford]?" Mr. Gerlach responded. He said, "No, not with Delila." He added that if King "went out the door"—that is, again declined to participate in a private interview—"she was finished." King walked out. Mulford then asked if she could go to work. Gerlach replied, "No. You've abandoned your job. You're finished." (P. 4a, 24a, 61a; A. 15, 29-30, 38, 51, 131, 170.)

During the noon hour of the same day, October 16, Cochran went to the office of Gerlach, Jr., and sought to present written grievances to him on behalf of Mulford, King, and herself. Gerlach, Jr., told her that he did not have time "to fool with them damn things. . . . I'm leaving town." Cochran laid the grievances on his desk but Gerlach picked them up and threw them in the trash. He then walked into the work area, pulled Cochran's time card, and told her, "you worked this morning, but you're not working this afternoon." Cochran went to the office of Gerlach, Sr., and asked if she had been fired. He responded, "Just go home. You wanted to draw unemployment now go on and draw it." Cochran left the plant. Later that day Cochran telephoned Gerlach's secretary and asked

whether Gerlach wanted her to report for work the next day. The secretary told her, "He said no." Cochran asked the secretary to "tell him that he can reach me at my home phone when he needs me." Cochran was never notified to come back to work. (P. 4a, 22a, 61a-62a; A. 31-33, 59, 67-68, 135.)

II. The Board's Conclusions and Order

The Board's conclusions divide into three related parts.

1. The Board found that on October 16, 1969, the Company discharged Catherine King because she had refused to attend an interview at its request without union representation in circumstances where she "had reasonable grounds to believe that disciplinary action might result from the Employer's investigation of her conduct" (P. 4a, 7a). This finding confronted the Board with the need to address the question of whether or not statutory protection is available in "a situation where an employee or his representative had been disciplined or discharged for requesting, or insisting on, union representation in the course of an interview" in which the risk of discipline to the to-be-interviewed employee reasonably existed (P. 5a). The Board concluded that in such a situation "it is a serious violation of an employee's individual right to be represented by his union if he can only request or insist on such representation under penalty of disciplinary action" (P. 6a). The Board explained that the employer was free to forego the interview if he was unwilling to conduct the interview with the union representative present, but that the employer was not free to coerce the employee's unrepresented attendance. The Board

stated the rationale in support of its conclusion as follows (P. 6a-7a);

> This seems to us to be the only course consistent with all of the provisions of our Act. It permits the employer to reject a collective course in situations such as investigative interviews where a collective course is not required but protects the employee's right to protection by his chosen agents. Participation in the interview is then voluntary, and, if the employee has reasonable ground to fear that the interview will adversely affect his continued employment, or even his working conditions, he may choose to forego it unless he is afforded the safeguard of his representative's presence. He would then also forego whatever benefit might come from the interview. And, in that event, the employer would, of course, be free to act on the basis of whatever information he had and without such additional facts as might have been gleaned through the interview.
>
> This seems to us to be the proper rule where, as here, the interview, whether or not purely investigative, concerns a subject matter related to disciplinary offenses.

The Board limited the employee's right to be free of coerced attendance at an interview without union representation to the situation where the employee has "reasonable grounds to fear" that the outcome of the interview may adversely affect his employment status (P. 6a and n. 3). This qualification meshes the employee's lack of need for protection where cause for apprehension does not reasonably exist with the employer's interest in operational flexibility. As the Board stated, "We would not apply the rule to such run-of-the mill shop-floor conversations as, for example, the giving of instructions or training or needed

corrections of work techniques. In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus we would then see no reasonable basis for him to seek the assistance of his representative" (P. 7a). The Board later explicitly confined the employee's right to be free of coerced attendance at an interview without union representation to the situation where the employee requests representation.[2] Finally, the Board adhered to its settled position distinguishing between an investigatory interview and a disciplinary interview. The Board found that the requested interview in this case was investigatory, and pointed out that, (1) as here, at an investigatory interview of an employee, which is fact-gathering in purpose, the employer has the option not to meet with the union repressentative so long as he chooses to forego the interview, while (2) at a disciplinary interview of an employee, where the employee is to be disciplined or the decision to discipline him is to be made, the employer has an indefeasible statutory bargaining obligation to meet with the union representative (P. 5a).[3]

Accordingly, one member dissenting, the Board concluded that "King had reasonable grounds to believe that disciplinary action might result from the Employer's investigation of her conduct. Under these circumstances King reasonably requested union representation. It is also clear that . . . [the Company]

[2] *Mobil Oil Corporation*, 196 NLRB 1052, n. 2 (1972), enforcement denied, 482 F.2d 842 (C.A. 7, 1973).

[3] The Trial Examiner found that the proposed interview with King was disciplinary in purpose (P. 38a, 45a), but the Board acted on the premise that the interview was investigatory (P. 5a-6a).

discharged King for insisting on this right. Therefore, we conclude that King's discharge was in violation of Section 8(a)(1)" (P. 7a-8a).

2. The Board found that the Company suspended shop chairlady Delila Mulford and assistant shop chairlady Martha Cochran "for performing their duties as union chairladies in seeking to represent King . . .", and later discharged Mulford for "insisting on representing King" (P. 8a). Accordingly, one member dissenting, the Board concluded that, as the conduct constituted "protected concerted activity," the suspensions and discharge "violated Section 8(a)(1) of the Act" (P. 8a-9a).

3. The Board unanimously concluded that the Company "discharged Cochran because she sought to engage in a protected concerted union activity, filing grievances on behalf of herself, Mulford, and King. Thus her discharge was in violation of Section 8(a)(3) and (1) of the Act" (P. 9a).

The order entered by the Board precisely encases its conclusions. As to coerced participation of an employee in an interview without union representation, the Board ordered the Company to refrain from (P. 9a-10a):

> Disciplining any employee for requesting to be represented by a labor organization at any interview or meeting held with the employee where the employee has reasonable grounds to believe that the matters to be discussed may result in his being the subject of disciplinary action.
>
> * * *
>
> Requiring, under threat of discipline, that any employee take part in an interview or meeting without union representation, where such representa-

> tion has been requested by the employee and where the employee has reasonable grounds to believe that the matters to be discussed may result in his being the subject of disciplinary action.

As to the efforts of the union representatives to furnish their fellow-employee with the representation asked of them, the Board ordered the Company to refrain from (P. 10a):

> Discriminating against union chairladies seeking to represent employees at any meeting held with an employee where the employee has reasonable grounds to believe that the matters to be discussed may result in his being the subject of disciplinary action and the employee has requested such representation.

As to the presentation of a grievance by a union representative, the Board ordered the Company to refrain from (P. 10a):

> Discriminating against union chairladies for seeking to file grievances.

Finally, the Board ordered the Company to offer reinstatement to King, Mulford and Cochran, and to make them whole for any loss of earnings sustained by them because of their suspensions and discharges (P. 55a).

III. The Decision of the Court of Appeals

The Court of Appeals enforced that part of the Board's order pertaining to the discharge of Cochran for "filing grievances on behalf of herself, Mulford, and King" (P. 62a). But it denied enforcement of the remainder of the order on the ground that "King had no right to have a union representative present at

the requested meetings with her employer . . ." (P. 62a). It based its conclusion virtually wholly on its reading of precedent (P. 63a-70a). In its view, while there is "no doubt that employees have a right to union representation after a grievance has been filed," the "issue here is whether that right may be extended under the Act to require employers to permit an employee to have union representation at interviews . . . whenever the employee has reasonable grounds to believe that disciplinary action might result from the employer's investigation" (P. 68a, n. 1). According to the Court of Appeals prohibition of coerced attendance at such an interview rests on a "new theory as to the meaning and application of the Act, and the extent of employees' rights thereunder," and implicates the Board in an impermissible assertion of "power to alter or rearrange employer-employee relations to suit its every whim" (P. 70a).

On July 17, 1973, two days before the decision of the Court of Appeals in this case, the Court of Appeals for the Seventh Circuit reached a like conclusion upon the same question.[4] In its view, while the right to bargain for and to exert economic pressure to secure union representation at an investigatory interview by contract "is plainly guaranteed by § 7 of the Act" (482 F.2d at 845), the statute does not by its own force confer the right to union representation, for the "requested Union representation at an investigatory interview is clearly not the kind of 'concerted activity' with which § 7 is primarily concerned" (*id.* at 847). Why it is not is unexplained. The court simply relied on its perception of "precedent" and its unparticularized version of

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[4] *Mobil Corporation* v. *N.L.R.B.*, 482 F.2d 842 (C.A. 7, 1973).

"history" (*id.* at 847-848). It was moved to its conclusion by apparent reluctance to embrace what it believed to be a "novel . . . interpretation" which, as it saw it, "would have been recognized many years ago" were it valid (*ibid.*).

On October 9, 1973, the Court of Appeals for the Fifth Circuit joined the Fourth and Seventh Circuits in rejecting the Board's conclusion. *N.L.R.B.* v. *J. Weingarten,* 485 F.2d 1135 (C.A. 5, 1973). Like the other courts of appeals, it rested its view on its perception of precedent (*id.* at 1137-38), opining without analysis "that an investigatory interview would be a premature stage at which to invoke a requirement of union representation in the absence of some showing that the purpose of the interview was not merely to elicit facts concerning employee conduct but to impose disciplinary measures upon the employee so that grievance hearings later on would merely put the seal on the employer's prejudgment" (*id.* at 1138). On April 29, 1974, this Court granted certiorari to review the judgments in this case and *Weingarten* and set the two "for oral argument in tandem" (A. 200).

SUMMARY OF ARGUMENT

I

The question this case presents is whether the National Labor Relations Act protects an employee from compulsory attendance without union representation at an interview which he reasonably believes may result in his subjection to discipline. Entry into the question is facilitated by a common premise. All grant that at or after the imposition of discipline the employee is statutorily entitled to union representation to contest it. The question then is whether the employee is entitled to

union representation in the predecisional stage when the employer seeks to subject him to a compulsory interview preparatory to its determination of whether or not the employee merits discipline.

The employee's need for the protection of union representation is at least as exigent in the investigation of his conduct by inquiry of him before the decision is made as it is thereafter. For fright, inexperience, or ignorance may expose him to unmerited discipline which would be avoidable had he had the aid of knowledgeable union representation at his interview. And the employer himself might well reach a different decision if his own inquiry of the employee were informed by the competent contribution of the union representative. Furthermore, the purpose of an interview is not confined to confirming or establishing the existence or absence of blameworthy conduct. Questions in extenuation of the offense and of the appropriate extent of discipline also require exploration.

Accordingly, what happens at the interview is always significant, and often decisive, in determining whether or not discipline is merited and in assessing the appropriate degree of punishment. To require postponement of union representation until after the decision is reached is therefore to deny it at the critical predecisional stage which may for all practical purposes be conclusive of the outcome.

Compelling the employee's subjection to such an interview without the assistance of union representation cannot be squared with the National Labor Relations Act. For the employee is required to confront his employer alone and unaided when the entirety of the statute is premised on eliminating just such individual

helplessness. Its design is to establish the conditions of equality by protecting recourse to collective action and thereby to overcome the "relative weakness of the isolated wage earner caught in the complex of modern industrialism . . . ."[5] To require an employee to submit to an interview which may lead to his discipline without the aid of union representation is therefore to perpetuate the very inequality which the Act denounces and to bar protected recourse to the very means which the Act safeguards as the way to overcome that inequality. Accordingly, as the Board holds, "Such a dilution of the employee's right to act collectively to protect his job interests is . . . unwarranted interference with his right to insist on concerted protection, rather than individual self-protection, against possible adverse employer action."[6]

II

Recognition that an employee has a statutory right to refuse to submit without union representation to an interview in which the risk of discipline reasonably inheres harmonizes with actual industrial practice. "An essential part of any investigation is to give the employee affected full opportunity to explain his actions."[7] But a full opportunity is significantly less than full if the employee is without the aid of union representation. Accordingly, "there is a well-established current of arbitral authority sustaining the right of such representation where the situation is such that the employee who is called in for interrogation has

[5] S. Rep. No. 573, 74th Cong., 1st Sess., 3 (1935).

[6] *Mobil Oil Corp.*, 196 NLRB 1052 (1972), enforcement denied, 482 F.2d 842 (C.A. 7, 1973).

[7] Slichter, Healy & Livernash, The Impact of Collective Bargaining on Management, 646 (1960).

reasonable cause to anticipate that the interview will result in the development of information which will be utilized as the basis for disciplinary action against him."[8] The participation of the union representative in the interview does not convert it into an adversary contest but rather enhances its usefulness by increasing the likelihood of securing more accurate information and a more informed interchange of views to the advantage of all. In general, therefore, the accepted view is that "an employee is entitled to the presence of a Committeeman at an investigatory interview if he requests one and if the employee has reasonable grounds to fear that the interview may be used to support disciplinary action against him."[9]

III

There is no merit in the bases asserted to resist the existence of a statutory right in the employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline.

1. Protection of the employee from unrepresented attendance at an interview of him depends upon his having "reasonable grounds to believe that the matters to be discussed may result in his being the subject of disciplinary action" (P. 9a). It is said that this standard is objectionable because "only the employee's subjective state of mind will presumably be examined, and the violation will turn not on any objective considerations but on the subjective state of mind of the employee" (P. 12a-13a). It is enough to respond, as the

[8] *Chevron Chemical Co.*, 60 LA 1066, 1071 (M.H. Merrill, 1973).

[9] *Universal Oil Products Co.*, 60 LA 832, 834 (B. M. Shieber, 1973).

Board does, that " '[r]easonable ground' will of course be measured, as here, by objective standards under all the circumstances of the case" (P. 6a, n. 3). It is a contradiction in terms to assert that " 'reasonable ground' must be treated as a purely subjective matter" (*ibid.*).

2. It is said that protection from coerced attendance without union representation at an interview in which the risk of discipline reasonably inheres is not conferred by the Act but can be secured only by contract for which the employees have a statutory right to bargain and strike (*supra*, p. 13). Confinement of protection to contract rests on *ipse dixit* alone. Union representation is in its essence concerted activity for mutual aid or protection; safeguarding the worker's refusal to confront his employer in an adverse situation without union representation is at the heart of the Act; and statutory protection in this situation harmonizes with actual industrial practice. The protection which the statute confers is of course often supplemented and refined by contract, but the statutory character of the right is not altered because of its contractual duplication or reenforcement.

3. It is said that precedent belies the existence of the statutory right (*supra*, pp. 13-14). But such precedent as is in point is unpersuasive; much that is asserted as precedent is simply misunderstood; and the ossifying role which is assigned to precedent is fundamentally mistaken. The Board has simply drawn from the statutory imperative " 'to give laborers opportunity to deal on equality with their employer' "[10] the modest re-

[10] *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 183 (1941), quoting from *American Steel Foundries* v. *Tri-City Council*, 257 U.S. 184, 209 (1921).

quirement that an employee shall be free from compulsory attendance without union representation at an interview which he reasonably believes may result in his subjection to discipline. The Board has thus performed its essential function of "translating into concreteness" (*Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 193 (1941)) "the dominant purpose of the legislation" (*Republic Aviation Co.* v. *N.L.R.B.*, 324 U.S. 793, 798 (1945)). This is the very reason for the Board's creation, and nothing in precedent bars it from the full discharge of the role for which it was commissioned.

ARGUMENT

I. THE NATIONAL LABOR RELATIONS ACT PROTECTS AN EMPLOYEE FROM COMPULSORY ATTENDANCE WITHOUT UNION REPRESENTATION AT AN INTERVIEW WHICH HE REASONABLY BELIEVES MAY RESULT IN HIS SUBJECTION TO DISCIPLINE.

The question this case presents is whether the National Labor Relations Act protects an employee from compulsory attendance without union representation at an interview which he reasonably believes may result in his subjection to discipline. Entry into the question is facilitated by a common premise. All grant that at or after the imposition of discipline the employee is statutorily entitled to union representation to contest it. The question then is whether the employee is entitled to union representation in the predecisional stage when the employer seeks to subject him to a compulsory interview preparatory to its determination of whether or not the employee merits discipline.

The employee's need for the protection of union representation is at least as exigent in the investigation of his conduct by inquiry of him before the decision is made as it is thereafter. For fright, inexperience, or

ignorance may expose him to unmerited discipline which would be avoidable had he had the aid of knowledgeable union representation at his interview. And the employer himself might well reach a different decision if his own inquiry of the employee were informed by the competent contribution of the union representative. Furthermore, the purpose of an interview is not confined to confirming or establishing the existence or absence of blameworthy conduct. Questions in extenuation of the offense and of the appropriate extent of discipline also require exploration.

Accordingly, what happens at the interview is always significant, and often decisive, in determining whether or not discipline is merited and in assessing the appropriate degree of punishment. To require postponement of union representation until after the decision is reached is therefore to deny it at the critical predecisional stage which may for all practical purposes be conclusive of the outcome.

Compelling the employee's subjection to such an interview without the assistance of union representation cannot be squared with the National Labor Relations Act. For the employee is required to confront his employer alone and unaided when the entirety of the statute is premised on eliminating just such individual helplessness. Thus, the mischief which the Act identifies is the "inequality of bargaining power between employees . . . and employers . . ." (§ 1, 2d ¶); the end it seeks is "restoring equality of bargaining power between employers and employees" (§ 1, 3d ¶); and the means by which that goal is to be realized is through "protecting the exercise by workers of full freedom of association . . . and designation of representatives of their own choosing . . . for the purpose of . . . mutual aid

or protection . . ." (§ 1, 5th ¶). The Act thus rests on the old insight that "[a] single employee was helpless in dealing with an employer", and that "[u]nion was essential to give laborers opportunity to deal on equality with their employer."[11] Its design is to establish the conditions of equality by protecting recourse to collective action and thereby to overcome the "relative weakness of the isolated wage earner caught in the complex of modern industrialism . . . ."[12]

To require an employee to submit to an interview which may lead to his discipline without the aid of union representation is therefore to perpetuate the very inequality which the Act denounces and to bar protected recourse to the very means which the Act safeguards as the way to overcome that inequality. Accordingly, the Board perceptively reached to the heart of the Act in rejecting that basic contradiction (*Mobil Oil Corp.*, 196 NLRB 1052 (1972), enforcement denied, 482 F.2d 842 (C.A. 7, 1973)):

> An employee's right to union representation upon request is based on Section 7 of the Act which guarantees the right of employees to act in concert for "mutual aid and protection." The denial of this right has a reasonable tendency to interfere with, restrain, and coerce employees in violation of Section 8(a)(1) of the Act. Thus, it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy. Such a dilu-

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[11] *American Steel Foundries* v. *Tri-City Council*, 257 U.S. 184, 209 (1921).

[12] S. Rep. No. 573, 74th Cong., 1st Sess., 3 (1935).

> tion of the employee's right to act collectively to protect his job interests is, in our view, unwarranted interference with his right to insist on concerted protection, rather than individual self-protection, against possible adverse employer action.

Inhospitality to this view simply reflects an attitude unattuned to the basic reach of this statute. Statutory solicitude for the employee easily embraces protecting him in his refusal to submit without union representation to an investigatory interview of his conduct in which the risk of discipline reasonably inheres. And the extent to which a contrary conclusion is alien to the Act is exemplified by the decisions cited by the Seventh Circuit to support the applicability in this case of the view that an activity may "not in fact [be] protected" though within the "literal reading of § 7 . . ." (482 F.2d at 846. For we are asked to look for guidance to such unprotected activity as mutiny (*Southern Steamship Co.* v. *N.L.R.B.*, 316 U.S. 31 (1942)), participation in a violent sitdown strike (*N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939)), engagement in a breach-of-contract strike (*N.L.R.B.* v. *Sands Mfg. Co.*, 306 U.S. 332 (1932)), and disparagement of the employer's product in circumstances akin to physical sabotage (*N.L.R.B.* v. *Local No. 1229, I.B.E.W.*, 346 U.S. 464 (1953)) (482 F.2d at 846, n. 11). It is a measure of the infelicity of the understanding of this statute that these decisions should be invoked when the question at issue is whether an employer can coerce an employee's subjection to an interview without union representation in circumstances where the employee reasonably fears that he is exposed to the infliction of discipline. Given that the Act has as "a primary purpose . . . to redress the perceived imbalance of economic power between labor

and management" (*American Ship Building Co.* v. *N.L.R.B.*, 380 U.S. 300, 316 (1965)), safeguarding the employee from unrepresented confrontation with his employer in this situation is within the natural protective ambit of the statute " 'read in the light of the mischief to be corrected and the end to be attained' " (*N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111, 124 (1944)).

II. AN EMPLOYEE'S STATUTORY RIGHT TO REFUSE TO SUBMIT WITHOUT UNION REPRESENTATION TO AN INTERVIEW IN WHICH THE RISK OF DISCIPLINE REASONABLY INHERES HARMONIZES WITH ACTUAL INDUSTRIAL PRACTICE.

Recognition that an employee has a statutory right to refuse to submit without union representation to an interview in which the risk of discipline reasonably inheres harmonizes with actual industrial practice. "An essential part of any investigation is to give the employee affected full opportunity to explain his actions." [13] But a full opportunity is significantly less than full if the employee is without the aid of union representation. Accordingly, "there is a well-established current of arbitral authority sustaining the right of such representation where the situation is such that the employee who is called in for interrogation has reasonable cause to anticipate that the interview will result in the development of information which will be utilized as the basis for disciplinary action against him." [14] The participation of the union representative in the interview does not convert it into an adversary contest but rather enhances its usefulness by increasing the likeli-

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[13] Slichter, Healy & Livernash, The Impact of Collective Bargaining on Management, 646 (1960).

[14] *Chevron Chemical Co.*, 60 LA 1066, 1071 (M.H. Merrill, 1973).

hood of securing more accurate information and a more informed interchange of views to the advantage of all (*Independent Lock Co.*, 30 LA 744, 746 (J. W. Murphy, 1958)):

> [Participation by the union representative] might reasonably be designed to clarify the issues at this first stage of the existence of a question, to bring out the facts and the policies concerned at this stage, to give assistance to employees who may lack the ability to express themselves in their cases, and who, when their livelihood is at stake, might in fact need the more experienced kind of counsel which their union steward might represent. The foreman, himself, may benefit from the presence of the steward by seeing the issue, the problem, the implications of the facts, and the collective bargaining clause in question more clearly. Indeed, good faith discussion at this level may solve many problems, and prevent needless hard feelings from arising.... [It] can be advantageous to both parties if they both act in good faith and seek to discuss the question at this stage with as much intelligence as they are capable of bringing to the problem.[15]

[15] See also, *Caterpillar Tractor Co.*, 44 LA 647, 651 (H. J. Dworkin, probably 1965):

> The procedure . . . contemplates that the steward will exercise his responsibility and authority to discourage grievances where the action on the part of management appears to be justified. Similarly, there exists the responsibility upon management to withhold disciplinary action, or other decisions affecting the employees, where it can be demonstrated at the outset that such action is unwarranted. The presence of the union steward is regarded as a factor conducive to the avoidance of formal grievances through the medium of discussion and persuasion conducted at the threshold of an impending grievance. It is entirely logical that the steward will employ his office in appropriate cases so as to limit formal grievances to those which involve differences of substantial merit. Whether this objective is accomplished will depend on the good faith of the parties, and whether they are amenable to reason and persuasion.

Therefore, in general, the accepted view is that "an employee is entitled to the presence of a Committeeman at an investigatory interview if he requests one and if the employee has reasonable grounds to fear that the interview may be used to support disciplinary action against him."[16]

Practice and the natural reach of the statute thus mesh, and the convergence convincingly confirms the rightness of the Board's interpretation.

III. THE BASES ASSERTED TO DENY THE EXISTENCE OF A STATUTORY RIGHT TO REFUSE TO SUBMIT WITHOUT UNION REPRESENTATION TO AN INTERVIEW IN WHICH THE RISK OF DISCIPLINE REASONABLY INHERES ARE WITHOUT MERIT.

We turn now to consider the bases asserted to resist the existence of a statutory right in the employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline.

A. The Claim Based on the Asserted Invalidity of the "Reasonable Grounds" Standard.

Protection of the employee from unrepresented attendance at an interview of him depends upon his having "reasonable grounds to believe that the matters to

[16] *Universal Oil Products Co.*, 60 LA 832, 834 (B. M. Shieber, 1973). See also, *Allied Paper Co.*, 53 LA 226 (J. F. Holly, 1969); *Pick-N-Pay Supermarkets*, 52 LA 832 (R. W. Haughton, 1969); *Thrifty Drug Stores Co.*, 50 LA 1253, 1262 (C. A. Jones, 1968); *Waste King Universal Products Co.*, 46 LA 283, 286 (J. D. Petree, 1966); *Dallas Morning News*, 40 LA 619, 623-624 (M. H. Rohman, 1963); *The Arcrods Co.*, 39 LA 784, 788-789 (E. R. Teple, 1962); *Valley Iron Works*, 33 LA 769, 771 (A. Anderson, 1960); *Schlitz Brewing Co.*, 33 LA 57, 60 (F. Meyers, 1959); *Singer Mfg. Co.*, 28 LA 570 (S. L. Cahn, 1957); *Braniff Airways*, 27 LA 892 (J. S. Williams, 1957); *John Lucas & Co.*, 19 LA 344, 346-347 (T. J. Reynolds, 1952).

be discussed may result in his being the subject of disciplinary action" (P. 9a). It is said that this standard is objectionable because "only the employee's subjective state of mind will presumably be examined, and the violation will turn not on any objective considerations but on the subjective state of mind of the employee" (P. 12a-13a). It is enough to respond, as the Board does, that " '[r]easonable ground' will of course be measured, as here, by objective standards under all the circumstances of the case" (P. 6a, n. 3). It is a contradiction in terms to assert that " 'reasonable ground' must be treated as a purely subjective matter" (*ibid.*). Reasonableness as a standard runs throughout the law and examples could be endlessly multiplied. Thus, under the terms of the National Labor Relations Act itself, an employer is not relieved of responsibility for discrimination against an employee "if he *has reasonable grounds for believing*" that certain facts exist (§ 8(a)(3)(A) and (B)), and preliminary injunctive relief against certain conduct must be sought if "the officer or regional attorney to whom the matter may be referred *has reasonable cause to believe* such charge is true and that a complaint should issue . . ." (§ 10(1), emphasis supplied). The "reasonable grounds to believe" standard adopted by the Board in this case is thus an unexceptionable criterion readily within the mainstream of the law.

B. The Claim Based on Assertion That the Right May Be Secured by Contract But Does Not Exist by Statute.

It is said that protection from coerced attendance without union representation at an interview in which the risk of discipline reasonably inheres is not conferred by the Act but can be secured only by contract for which

the employees have a statutory right to bargain and strike (*supra*, p. 13). Confinement of protection to contract rests on *ipse dixit* alone. Union representation is in its essence concerted activity for mutual aid or protection; safeguarding the worker's refusal to confront his employer in an adverse situation without union representation is at the heart of the Act; and statutory protection in this situation harmonizes with actual industrial practice. The protection which the statute confers is of course often supplemented and refined by contract.[17] The substance of the statutory right may be enhanced by particularized contractual definition of its scope; realization of the statutory right may be furthered by contractual specification of the procedural means for asserting it; and incorporation of the statutory right into the contract performs the important function of eliminating debate as to its existence by the people on the factory floor who know their contract if not the law. Accordingly, the contract may facilitate vindication of the right, but it is the statute which creates it. Thus, discrimination because of union membership or nonmembership is prohibited by 40 percent of contracts,[18] but it can hardly be suggested that the right which the contract protects is therefore not statutory.[19]

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[17] Dunau, *Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems*, 57 Col. L. Rev. 52, 66-80 (1957).

[18] Basic Patterns in Union Contracts, 95:2 (BNA, February 1971).

[19] See *Alexander* v. *Gardner-Denver Co.*, 42 U.S.L.W. 4214, 4218 (S. Ct., Feb. 19, 1974); *Arnold* v. *Carpenters District Council of Jacksonville*, 42 U.S.L.W. 4754 (S. Ct., May 20, 1974).

C. The Claim Based on Precedent

It is said that precedent belies the existence of the statutory right (*supra*, pp. 13-14). But such precedent as is in point is unpersuasive; much that is asserted as precedent is simply misunderstood; and the ossifying role which is assigned to precedent is fundamentally mistaken.

1. Three decisions may be read as precedent adverse to the proposition that the Act protects an employee from coerced attendance without union representation at an interview with his employer which he reasonably fears may expose him to the risk of discipline. One is an obscure and cryptic 1947 decision of a court of appeals reversing a 1945 Board determination which is itself unclear and equivocal.[20] The other two are 1964 summary affirmances by the Board of trial examiners' decisions which are conclusory and unreasoned.[21] The search for the right reading of a statute should not atrophy with the first judicial rejection of an administrative determination, nor with unexplained agency affirmances of two trial examiners' decisions.

2. The second line of precedent, said to be contrary to the Board's interpretation, is simply misunderstood and is not adverse at all. The Board's settled position, adhered to in this case, distinguishes between an investigatory interview and a disciplinary interview: (*i*) as here, the Board found that the requested interview was investigatory, and at such a fact-gathering and exploratory interview the employer has the option not to meet

[20] *N.L.R.B.* v. *Ross Gear & Tool Co.*, 158 F.2d 607, 611-614 (C.A. 7, 1947), setting aside, 63 NLRB 1012, 1033-34 (1945).

[21] *Dobbs Houses*, 145 NLRB 1565, 1570 (1964); *Electric Motors and Specialties*, 149 NLRB 1432, 1440 (1964).

with the union representative so long as he chooses to forego the interview with the employee; (*ii*) in contrast, at a disciplinary interview of an employee, where the employee is to be disciplined or the decision to discipline him is to be made, the employer has an indefeasible statutory bargaining obligation to meet with the union representative.[22]

[22] *Cf., Texaco, Inc.*, 168 NLRB 361 (1967), enforcement denied, 408 F.2d 142 (C.A. 5, 1969), in which the Board found that collective bargaining was obligatory because the interview of the employee was designed to support a disciplinary decision against him already made, *with Jacobe-Pearson Ford*, 172 NLRB 594 (1968), in which the Board found that collective bargaining was not required because the interview of the employee was "essentially for the gathering of information" (*id.* at 595). The Court of Appeals for the Fifth Circuit denied enforcement of the Board's order in *Texaco*, not because it disapproved of the requirement of collective bargaining at a disciplinary interview, but because in its view the "evidence is overwhelming that the interview was investigatory in nature. . . ." *Texaco Inc.* v. *N.L.R.B.*, 408 F.2d 142, 144 (C.A. 5, 1969). It therefore held that, "since the interview dealt only with eliciting facts and not with the consequences of the facts revealed, its subject matter was not within the scope of compulsory collective bargaining." 408 F.2d at 145.

In its post-*Texaco* decisions the Board has been uniformly of the view that collective bargaining is obligatory at a disciplinary interview. *National Can Corp.*, 200 NLRB No. 156, 82 LRRM 1096 (1972); see also the decision of the trial examiner in *United Aircraft Corp.*, 179 NLRB 935, 968-969 (1968), in which the merits of this question were not reached by the Board, 179 NLRB at 937-938 (1969), or the Court of Appeals, 440 F.2d 85, 88, 97-98 (C.A. 2, 1971).

In contrast, collective bargaining has not been required by the Board at an investigatory interview, but in no post-*Texaco* case until the present one has the Board been confronted with action by an employer seeking to coerce an employee's unrepresented attendance at an investigatory interview. See, in addition to the post-*Texaco* cases previously cited in this note, *Lafayette Radio Electronics*, 194 NLRB 491 (1971); *Illinois Bell Tel. Co.*, 192 NLRB 834 (1971); *Texaco Inc.*, 179 NLRB 976 (1969); *Wald Mfg. Co.*, 176 NLRB 839, 846 (1969), affirmed on proceedings not presenting

It is this distinction which is misinterpreted. It is argued that, since the employer's statutory obligation to meet with the union representative is confined to a disciplinary interview of the employee, it necessarily follows that the employer can coerce the unrepresented attendance of an employee at an investigatory interview of him. But the logic of this argument is quite obviously fallacious. That the statute does not compel the employer to meet with the union representative does not mean that the statute allows the employer to compel the employee's submission to an interview without the

this question, 426 F.2d 1328 (C.A. 6, 1970); *Dayton Typographic Service*, 176 NLRB 357 (1969); *Chevron Oil Co.*, 168 NLRB 574 (1967).

Post-*Texaco*, beginning with this case, the distinctive question which has emerged is whether, although collective bargaining at an investigatory interview is not required, the employer can nevertheless compel the employee's unrepresented attendance, and the Board has held that the employee is statutorily safeguarded from such compulsion. *Quality Mfg. Co.*, 195 NLRB 197 (1972), enforcement denied, 481 F.2d 1018 (C.A. 4, 1973), cert. granted, April 29, 1974 (A. 200); *Mobil Oil Corp.*, 196 NLRB 1052 (1972), enforcement denied, 482 F.2d 842 (C.A. 7, 1973); *J. Weingarten, Inc.*, 202 NLRB No. 69, 82 LRRM 1559 (1973), enforcement denied, 485 F.2d 1135 (C.A. 5, 1973), cert. granted, April 29, 1974 (A. 200); *New York Telephone Co.*, 203 NLRB No. 46, 84 LRRM 1041 (1973). The crux of the offense is coercion of an employee's unrepresented attendance at an investigatory interview; the employer commits no violation where it terminates "the interviews without further ado when the employees involved refuse . . . to answer any questions without a union representative present." *Western Electric Co.*, 205 NLRB No. 46, 84 LRRM 1041, 1042 (1973).

Finally, the result in one case turned on Chairman Miller's swing view, which he alone has had occasion to express, that an employee's freedom from unrepresented attendance at an investigatory interview may be waived by the agreement of the union and employer. *Western Electric Co.*, 198 NLRB No. 82, 80 LRRM 1705, 1707 (1972). No question of waiver is before this Court in either this case or *Weingarten*. See, *N.L.R.B.* v. *The Magnavox Co.*, 42 U.S.L.W. 4300 (S. Ct., 1974).

union representative. Rather, each has equivalent freedom, the employer the liberty not to meet with the union representative, and the employee the liberty not to meet without the union representative. For example, an employer may not discharge his unorganized employees who walk off the job in a body because he has ignored their complaint about the lack of heat in the plant. *N.L.R.B.* v. *Washington Aluminum Co.*, 370 U.S. 9 (1962). Yet, since those same workers do not have a statutory bargaining representative, the employer is under no obligation to meet and confer about the cold in the plant.

In short, an employer is not free to coerce his employees in their exercise of a right protected by section 7 simply because the employer is not under an additional statutory obligation to bargain. It is this simple and basic distinction that the Board has perceived but the courts miss. As the Board has stated, "while the employer's denial of . . . a request [by an employee to be represented by his union] may not derogate the bargaining rights of the union, in violation of Section 8(a)(5), in the case of a purely investigatory interview, this is not say either: (a) that the employer may discipline the employee for demanding representation; or (b) that the employer may insist, by threatening to discipline the employee's representative, that the interview be held without his presence" (P. 6a).

But were it true that the inexorable consequence of an employer's option not to meet with the union at an investigatory interview is to free the employer to coerce the employee's unrepresented attendance at that interview, the inquiry would not end. For the resulting inequity—conjoining effacement of the union at the

employer's will with the employee's subjection at the employer's command to unrepresented confrontation—would then compel examination of the validity of the premise that the employer has no statutory obligation to meet with the union at an investigatory interview of the employee. The object of the interview is acquisition of information as to the employee's conduct. At stake based on the information secured is the discharge, discipline, or exoneration of the employee. An employee's subjection to discharge or discipline is unquestionably a mandatory bargaining matter.[23] The information on which that decision is based is equally the subject of mandatory disclosure to the union as the indispensable adjunct of informed discussion.[24] Accordingly, since collective bargaining and divulgence of the information are obligatory after-the-fact of decision, the question reduces to why the union should not as of right at the employee's request be a party to the development of the information at the interview of the employee in advance of decision. Clearly, it should be. Inquiry of the employee is designed to elicit information from him on which his job security is dependent. The union as the chosen representative is the employee's natural protector in this process. Its mandatory participation is easily within the definition of obligatory collective bargaining defined by section 8(d) of the National Labor Relations Act: "the performance of the mutual obligation of the employer and the representative of the em-

[23] *National Licorice Co.* v. *N.L.R.B.*, 309 U.S. 350, 360 (1940); *Inland Steel Co.* v. *N.L.R.B.*, 170 F.2d 247, 252 (C.A. 7, 1948), cert. denied on this point, 336 U.S. 960 (1949).

[24] *N.L.R.B.* v. *Acme Industrial Co.*, 385 U.S. 432 (1967); *N.L.R.B.* v. *Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Curtiss-Wright Corp.* v. *N.L.R.B.*, 347 F.2d 61, 68-69 (C.A. 3, 1965).

ployees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ." Exposure of an employee to discharge or discipline is surely within the scope of "terms and conditions of employment," and an investigatory interview of that employee to adduce facts pertaining to his exposure is surely an appropriate occasion for the union's discharge of its representational role and the employer's "performance" of its reciprocal "obligation . . . to meet . . . and confer" with the union. To meet and confer at the investigatory interview, in a common fact-gathering effort in advance of decision and therefore unhampered by hardened positions, is the stage of the process which is the natural place to begin fulfillment of the mutual obligation of the union and the employer to treat with each other on the subject.

In sum, the employer's argument fails on two grounds. First, it is fallacious to argue from the premise that the statute does not compel the employer to meet with the union representative to the conclusion that the statute therefore allows the employer to compel the employee's submission to an interview without the union representative. Second, the premise of the argument is in any event unsound, for the statute does obligate the employer to meet with the union at an investigatory interview.

3. The role of precedent has in any event been fundamentally misconceived. Adjudication within the common law tradition is often tentative at the beginning, with some backing and filling as the scope of the problem is better appreciated under the impress of continuing exposure to different manifestations of it, and with the formulation of a definitive position necessarily

deferred until the ripeness of time has revealed in full dimension the considerations pertinent to the solution. This is especially true of the administrative process when it works well. " 'Cumulative experience' begets understanding and insight by which judgments . . . are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process." *N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 349 (1953) "The nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rationale response, not a quick definitive formula as a comprehensive answer. And so, it is not surprising that the Board has more or less felt its way . . . , and has modified and reformed its standards on the basis of accumulating experience." *I.U.E.* v. *N.L.R.B.*, 366 U.S. 667, 674 (1961). To freeze development in the name of precedent contradicts the genius of the process. " 'Wisdom too often never comes, and so one ought not to reject it merely because it comes late.' " *Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235, 255 (1970) (Stewart, J., concurring).

This evolutional approach is especially fitting here considering both the nature of this statute in its present application and the particular problem it addresses in this case. "As a charter of freedom," the National Labor Relations Act, like the Sherman Antitrust Act, "has a generality and adaptability comparable to that found to be desirable in constitutional provisions." [25] More specifically, "[l]egislation, both statutory and

[25] *Appalachian Coals* v. *United States*, 288 U.S. 344, 359-360 (1933).

constitutional, is enacted, it is true, from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth." [26]

As presently pertinent, the principle at the heart of the National Labor Relations Act is elimination of the helplessness of the individual worker by according to him the opportunity to attain equality through collective representation (*supra*, pp. 20-23). This principle has direct applicability to the question this case poses. The administration of discipline to control on-the-job misconduct is a pervasive part of life in the industrial community.[27] For the worker discharge because of a claimed infraction "is 'economic capital punishment'—the maximum penalty the employer may assess against the employee." [28] It is not alone the loss of his job that the employee suffers; termination strips him of his seniority, and concomitantly divests him of such benefits as pension rights, promotional preference, and layoff protection normally dependent on length of service. Discipline short of discharge is simply less severe pun-

[26] *Weems* v. *United States*, 217 U.S. 349, 373 (1910), quoted in *Inland Steel Co.* v. *N.L.R.B.*, 170 F.2d 247, 254 (C.A. 7, 1948), cert. denied on this point, 336 U.S. 960 (1949), to support an expanding reading of the subjects within the scope of mandatory bargaining.

[27] *E.g.*, O. W. Phelps, Discipline and Discharge in the Unionized Firm (1959); L. Stessin, Employee Discipline (1960); F. Elkouri and E. A. Elkouri, How Arbitration Works, 610-666 (3d ed., 1973); D. L. Jones, *The Supervisor and the Disciplinary Process in a Unionized Setting*, 26 Personnel Administration 42 (1963).

[28] O. W. Phelps, *supra*, n. 27, at 28.

ishment which is different in the degree of injury but not in the quality of the worker's concern with it. For the employer discipline is necessary to the maintenance of order and responsible conduct essential to production. For both the employer and the worker substantive and procedural fairness in the administration of discipline is indispensable. For the worker the need for protection against unjust punishment is self-evident. For the employer the need to refrain from unjust punishment is hardly less self-evident, for there is nothing more likely to wrack the industrial community to the detriment of the employer's self-interest in production and profitability than disciplinary unfairness.

Within this complex of basic and compatible interests the Board has drawn from the statutory imperative " 'to give laborers opportunity to deal on equality with their employer' " [29] the modest requirement that an employee shall be free from compulsory attendance without union representation at an interview which he reasonably believes may result in his subjection to discipline. The Board has thus performed its essential function of "translating into concreteness" (*Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 193 (1941)) "the dominant purpose of the legislation" (*Republic Aviation Co.* v. *N.L.R.B.*, 324 U.S. 793, 798 (1945)). It has fashioned a specific to reach an evil within the range of mischief at which the statute is aimed. It has reached a fair and reasoned judgment upon a question within its competence and its answer is therefore entitled to stand. *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221, 235-236 (1963).

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[29] *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 183 (1941), quoting from *American Steel Foundries* v. *Tri-City Council*, 257 U.S. 184, 209 (1921).

CONCLUSION

When all is said and done, the stark fact remains that an employer has discharged an employee, and suspended and discharged her fellow-employees who are her union representatives, for no cause other than insistence on union representation. Protection from this raw exercise of economic power to squelch the mutual aid which is at the heart of union representation is within the plain unsophisticated reach of the National Labor Relations Act. "In our increasingly dependent society, in the context of an employment situation in which collective action is the norm, it seems to be an anomaly to see the individual not merely standing alone, but being forced to stand alone on matters intimately related to his or her economic existence." [30] Accordingly, insofar as it denies enforcement of the Board's order, the judgment should be reversed and the cause remanded to the Court of Appeals with directions to enforce the Board's order in full.

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June, 1974

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[30] D. W. Brodie, *Union Representation and the Disciplinary Interview*, 15 Bost. Col. Ind. Comm. L. Rev. 1, 49 (1973).

Supreme Court, U. S.
FILED
JUL 11 1974
MICHAEL RODAK, JR., CLERK

No. 73-795

In the Supreme Court of the United States

OCTOBER TERM, 1973

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, UPPER SOUTH DEPARTMENT, AFL-CIO, PETITIONER

v.

QUALITY MANUFACTURING COMPANY AND NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-765

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, UPPER SOUTH DEPARTMENT, AFL-CIO, PETITIONER

v.

QUALITY MANUFACTURING COMPANY AND NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 58a-71a)[1] is reported at 481 F.2d 1018. The decision

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari filed by the Union. "A." refers to the separate appendix to the briefs.

and order of the Board (Pet. App. 1a-58a) are reported at 195 NLRB 197.

JURISDICTION

The judgment of the court of appeals (Pet. App. 72a) was entered on July 19, 1973. On October 5, 1973, the Chief Justice extended the time for filing a petition for a writ of certiorari to December 17, 1973. The petition was filed on November 12, 1973, and was granted on April 29, 1974 (A. 200). The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at pp. 2-3 of the petition.

QUESTION PRESENTED

Whether it is an unfair labor practice for an employer to discharge an employee for insisting that her union representative be present at an investigatory interview with the employer which the employee reasonably believes may result in disciplinary action, and to suspend or discharge employee-union representatives for attempting to attend such an interview when asked.[2]

[2] A similar question is presented in *National Labor Relations Board* v. *J. Weingarten, Inc.*, No. 73-1363, certiorari granted, April 29, 1974, which has been set for argument in tandem with the present case.

STATEMENT

A. The Board's Findings of Fact

Quality Manufacturing Company (the Company) is engaged in the manufacture of women's clothing at Point Pleasant, West Virginia (Pet. App. 19a). The Company's owners and principal officers are Lawrence Gerlach, Sr., president; his wife, Mary Kathryn Gerlach, production manager; and their son, Lawrence Gerlach, Jr., general manager (Pet. App. 2a; A. 4, 8, 68).

Since 1968, Upper South Department, International Ladies' Garment Workers' Union (the Union) has represented the production and maintenance employees of the Company (Pet. App. 20a). Delila Mulford, an employee of the Company for 12 years, is the Union's chairlady (or steward) who, pursuant to the collective agreement, represents employees in disputes with management (Pet. App. 23a; A. 45, 189).

On the morning of Friday, October 10, 1969, the three Gerlachs met with chairlady Mulford and three other employees, including Catherine King, a long-time Company employee. The employees complained that they could not make a satisfactory wage under the piece work system then in effect. The discussion ended in acrimony, with Gerlach, Jr. cursing Mulford and telling her "to get out and if we didn't like the way it was there in the company to go else-

where." (Pet. App. 23a, 59a; A. 46, 53, 57-58, 73, 78.)

Later that day, Mrs. Gerlach saw Catherine King waving her arms and gesturing to the other employees who had been at the meeting. Mrs. Gerlach directed her to resume production, but King told Mrs. Gerlach to "tend to your business." Thereupon, Mrs. Gerlach directed King to go to Mr. Gerlach's office (Pet. App. 2a, 23a; A. 46-47, 73-74). On her way to the office, King asked chairlady Mulford to accompany her. Although Mrs. Gerlach told her that she "had no business down there," Mulford went with King to the anteroom of the office of Gerlach, Sr. (Pet. App. 2a, 23a; A. 47, 74).

There, Mr. Gerlach told Mulford to return to her work station because "it wasn't a grievance and he didn't have any business with her." When Mulford replied that "Catherine paid her dues and she was entitled [for me] to be there," Mrs. Gerlach warned her that she was "endangering [her] job" (Pet. App. 2a, 23a; A. 47, 82, 92, 126-127, 148). Gerlach, Sr. then ordered King into his office but she refused to go without Mulford (Pet. App. 2a, 23a; A. 74). At that point, Gerlach told King and Mulford to return to their work stations and they obeyed his instruction (Pet. App. 2a, 23a; A. 172-173). On Sunday, October 12, Mrs. Gerlach telephoned Mulford and informed her that she was suspended for two days (Pet. App. 3a, 23a-24a; A. 48).

The following day, King reported for work and found that her timecard was not in the rack, indicating under plant practice that she was wanted in the office. Before going there, she asked Assistant Chairlady Martha Cochran to accompany and represent her. Cochran, who had not yet "punched in" for work, agreed. Outside the office, they met Mrs. Gerlach, who warned Cochran that "your time card is upstairs and my advice to you is to go on upstairs and go to work if you want your job." She added that they only wanted to talk to King and "take up where we left off Friday." Cochran replied, "I'm sorry but if that's what you want to talk to her about that is union business and she asked me to represent her." Cochran added that she was a "union steward and that was my duty." (Pet. App. 3a, 20a-21a, 60a; A. 25-27.)

Cochran and King then spoke to Gerlach, Sr., asking him if he was going to give King her timecard. He told them that "he was not going to give her her timecard until she came into the office and talked to him in private." Cochran stated that King "wants union representation," but Gerlach insisted that "he would only talk to one of [them] at a time." Cochran and King declined to do this and then sat near the office for the rest of the day, waiting for Gerlach to return King's card. In the meantime, Cochran's card, too, was "pulled" from the rack. (*Ibid.*)

The next morning, Tuesday, October 14, Cochran and King again went to the office and asked Gerlach, Sr. if he was going to give King her timecard. He told them he was not going to do so until King "came

into the office and sat down and talked to him in private." Cochran also asked about her own timecard and was told that she had been suspended for two days for being away from her work station. King and Cochran then left the plant. (Pet. App. 3a-4a, 21a; A. 28, 168.)

The next day, Wednesday, Mulford's two-day suspension ended, and she, along with Cochran and King, returned to the office of Gerlach, Sr. to ask for their timecards. Gerlach told Mulford that "he was going to give me my card, but for me to mind my own business." Mulford replied, "I was minding my own business, that Catherine [King] had a right to union representation as well as anybody else * * *." When Mulford inquired as to the status of Cochran and King, she was told "that Martha [Cochran] was suspended yet and that Catherine [King] was wanted in the office without me." Mulford then returned to work, and the other two employees left the plant. (Pet. App. 4a, 24a; A. 28-29, 48-51, 169.)

On Thursday, October 16, Cochran's two-day suspension expired, and, together with Mulford and King, she went to the office of Gerlach, Sr. At the outer office they met Mr. and Mrs. Gerlach, who gave Cochran her timecard and told her to go to work; she complied with these instructions. The Gerlachs then told King that they wanted to see her in the office alone. When she asked, "With Delila [Mulford]?," Gerlach told her, "No, not with Delila." He told King that if "she went out the door that was it,

she was finished." Since King was unwilling to go to the office without Mulford, she left the plant. Mulford then asked if she should go back upstairs to work, to which Gerlach, Sr. replied, "No. You've abandoned your job. You're finished." He told Mulford "to get out," and she left the premises. (Pet. App. 4a, 24a; A. 15-16, 29-30, 51, 170.)

During the lunch hour that day, Cochran went to the office of Gerlach, Jr. to present written grievances on behalf of Mulford, King, and herself. Gerlach, Jr. refused to take the grievances, stating, "I don't have time to fool with them damn things. I'm leaving town." Cochran laid the grievance down on Gerlach's desk but he "grabbed them and threw them in the trash." Gerlach, Jr. then walked into the work area, pulled Cochran's timecard, and said "you worked this morning, but you're not working this afternoon. You're nothing but a damn smart aleck." Cochran went to the office of Gerlach, Sr. and asked if she was fired. Gerlach, Sr. at first equivocated but, when she asked what she should do, he said, "Just go home. You wanted to draw unemployment now go on and draw it." Cochran left the plant. (Pet. App. 4a, 22a; A. 31-32, 59, 67-68.)

That afternoon, Cochran telephoned the office and requested the secretary of Gerlach, Sr. to ask him if he wanted her to report back to work the next day. She was told that "he said no." Cochran asked the secretary to "tell him that he can reach me at my home phone when he needs me." Cochran has

never been notified to come back to work. (Pet. App. 4a, 22a; A. 33, 135.)

B. The Board's Decision and Order

The Board (with one Member dissenting) held that the Company violated Section 8(a)(1) of the Act by discharging King for refusing, on October 16, 1969, to attend the interview with Gerlach, Sr. without the presence of her union representative, and by suspending Cochran and suspending and discharging Mulford "for performing their duties as union chairladies in seeking to represent King" (Pet. App. 7a-8a). The Board found that King "had reasonable grounds to believe that disciplinary action might result from the Employer's investigation of her conduct" (Pet. App. 7a). The Board concluded that, where such reasonable belief exists, "it is a serious violation of an employee's individual right to be represented by his union if he can only request or insist on such representation under penalty of disciplinary action" (Pet. App. 6a).

The Board noted that, "while the employer's denial of such a request may not derogate the bargaining rights of the union, in violation of Section 8(a)(5), in the case of a purely investigatory interview, this is not to say either: (a) that the employer may discipline the employee for demanding representation; or (b) that the employer may insist, by threatening to discipline the employee's representative, that the interview be held without his presence" (Pet. App. 6a). The Board concluded that either of these em-

ployer actions would violate the Act. The Board explained that, under its ruling, the employer need not accede to the request for representation, but could not force the employee to attend unassisted. "Participation in the interview is then voluntary, and, if the employee has reasonable ground to fear that the interview will adversely affect his continued employment, or even his working conditions, he may choose to forego it unless he is offered the safeguard of his representative's presence. He would then also forego whatever benefit might come from the interview. And, in that event, the employer would, of course, be free to act on the basis of whatever information he had and without such additional facts as might have been gleaned through the interview" (footnote omitted). (Pet. App. 6a-7a.)

Finally, the Board unanimously held that the Company violated Section 8(a)(3) and (1) of the Act by discharging Cochran because of her attempt to file grievances with Gerlach, Jr. on behalf of herself, Mulford, and King (Pet. App. 9a).

The Board ordered the Company, *inter alia*, to cease and desist from "[r]equiring, under threat of discipline, that any employee take part in an interview or meeting without union representation, where such representation has been requested by the employee and where the employee has reasonable grounds to believe that the matters to be discussed may result in his being the subject of disciplinary action." The order also required the Company to offer reinstatement with backpay to King, Mulford, and Cochran (Pet. App. 10a, 55a).

C. The Decision of the Court of Appeals

The court of appeals enforced that part of the Board's order pertaining to the discharge of Cochran because of her attempt to file grievances (Pet. App. 62a).[3] But it denied enforcement of the remainder of the order on the ground that "King had no right to have a union representative present at the requested meetings with her employer * * *" (Pet. App. 62a). Relying on its reading of prior precedent (Pet. App. 63a-67a), the court concluded that "the management prerogative of conducting an investigatory interview such as Quality attempted here * * * [is not] a violation of the Act" (Pet. App. 71a).

ARGUMENT

IT IS A VIOLATION OF THE NATIONAL LABOR RELATIONS ACT FOR AN EMPLOYER TO DISCHARGE AN EMPLOYEE FOR REFUSING TO ATTEND WITHOUT THE PRESENCE OF HER UNION REPRESENTATIVE AN INVESTIGATORY INTERVIEW WHICH SHE REASONABLY BELIEVES MAY RESULT IN DISCIPLINE, AND TO SUSPEND OR DISCHARGE EMPLOYEE-UNION REPRESENTATIVES FOR ACCEDING TO THE EMPLOYEE'S REQUEST

In its brief in *National Labor Relations Board* v. *J. Weingarten, Inc.*, No. 73-1363, the Board has fully set forth its reasons for believing that Section

[3] The Company has not cross-petitioned for a writ of certiorari and that aspect of the court of appeals' decision is not open to review here. *Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512, 516; *National Labor Relations Board* v. *International Van Lines*, 409 U.S. 48, 52, n. 4.

7 of the Act gives an employee the right to union representation at an investigatory interview with the employer which the employee reasonably believes may result in discipline against him, and that an employer therefore violates Section 8(a)(1) by requiring the employee to participate in the interview without such representation. We shall not repeat those reasons here, but refer the Court to our brief in *Weingarten*.[4] If the Board's position in *Weingarten* is sustained, it follows that an employer could not discharge an employee for refusing to attend such an interview unassisted by his union representative, or suspend or discharge employee-union representatives for acceding to the employee's request. See *Trailmobile Division, Pullman, Inc.* v. *National Labor Relations Board*, 407 F.2d 1006, 1008-1009 (C.A. 5). Accordingly, this brief is confined to showing that the record supports the Board's factual findings.

1. As shown in the Statement (*supra*, pp. 3-4), on the morning of October 10, 1969, King, several other employees, and chairlady Mulford had a meeting with the three Gerlachs concerning the employees' dissatisfaction with their earnings under the piece rates then in force. The meeting had been "acrimonious," and, during it, Gerlach, Jr. had told chairlady Mulford that if the grievants "did not like the way it was there in the company to go elsewhere." Later that day, Mrs. Gerlach saw King creating a disturbance by gesturing to the other employees involved

[4] We are serving copies of that brief on counsel for the other parties to the present case.

in the morning grievance session. Mrs. Gerlach testified that when she told King to get back to work, King "sassed me" (A. 74). Thereupon, Mrs. Gerlach insisted that King go to the office of Gerlach, Sr. with her because she "wanted [her] husband to correct King for this sassing [of her]" (A. 79). In such circumstances, King could reasonably have believed that discipline could result from the interview with Gerlach, Sr.[5]

On October 16, Gerlach, Sr. discharged King for insisting on union representation. Thus, Gerlach insisted on seeing King alone, refused her request to be accompanied by Mulford, and added that, if King "went out the door that was it, she was finished"; King thereupon left the plant (A. 51; *supra*, pp. 6-7).[6]

2. The facts summarized in the Statement (*supra*, pp. 4-7) also fully support the Board's findings that Cochran and Mulford were suspended, and Mulford discharged, for attempting, in their capacities

[5] King did not testify at the Board hearing since she had recently undergone serious brain surgery (Pet. App. 45a; A. 23-24). As the Board stated in its decision here (Pet. App. 6a, n. 3): "'Reasonable ground' will of course be measured, as here, by objective standards under all the circumstances of the case." Accordingly, the subjective state of mind of the employee involved is irrelevant. Cf. *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 608.

[6] As the Trial Examiner, whose finding was adopted by the Board (Pet. App. 7a, n. 5), found (Pet. App. 46a): "Since King was still on suspension at the time she could not report to work, and thus was compelled to go out the door when she decided not to speak to Gerlach alone. This constitutes a discharge of King."

as union representatives, to attend Gerlach's interview with King at King's request. On Sunday, October 12, after trying to represent King on October 10, Mulford was suspended for two days. Similarly, on October 14, the day after she had tried to represent King, Cochran was suspended for two days. On October 16, after King had been discharged for again insisting upon representation by Mulford, Gerlach, Sr. told Mulford also "to get out" because she was "finished" (A. 51).[7]

[7] The Board rejected as pretextual the Company's contention that Cochran and Mulford were disciplined for leaving the floor without permission, rather than for their attempts to accede to King's request, pointing out that union chairladies had left the floor on union business in the past without permission (Pet. App. 8a). Cf. *Emerson Electric Co.*, 185 NLRB 346, which the Board distinguished (Pet. App. 8a, n. 7).

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it denies enforcement of the Board's order, and the case should be remanded to that court with directions to enforce the Board's order in full.

Respectfully submitted.

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JULY 1974.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 552948 5

Supreme Court, U. S.
FILED
AUG 12 1974
MICHAEL RODAK, JR., CLERK

No. 73-765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

THE INTERNATIONAL LADIES' GARMENT WORKERS' UNION, UPPER SOUTH DEPARTMENT, AFL-CIO,

Petitioner,

v.

QUALITY MANUFACTURING COMPANY AND NATIONAL LABOR RELATIONS BOARD,

Respondents.

BRIEF FOR QUALITY MANUFACTURING COMPANY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-765

THE INTERNATIONAL LADIES' GARMENT WORKERS' UNION, UPPER SOUTH DEPARTMENT, AFL-CIO,

Petitioner,

v.

QUALITY MANUFACTURING COMPANY AND NATIONAL LABOR RELATIONS BOARD,

Respondents.

BRIEF OF QUALITY MANUFACTURING COMPANY

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 58a-71a) is reported at 481 F.2d 1018. The decision and order of the Board (Pet. App. 1a-58a) are reported at 195 NLRB 197.

JURISDICTION

The judgment of the court of appeals (Pet. App. 72a) was entered on July 19, 1973. On October 5, 1973, the Chief Justice extended the time for filing a

petition for a writ of certiorari to December 17, 1973. The petition was filed on November 12, 1973, and was granted on April 29, 1974 (A. 200), The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at pp. 2-3 of the petition.

QUESTIONS PRESENTED

I. Whether Quality violated Section 8(a)(1) of the Act by denying the request of an employee for representation at an investigative interview before Quality was committed to discipline and before any grievance had been filed.

II. Whether the Board, in deciding this case on a novel theory of law which contravened twenty-five years of decisional law, has fulfilled its required obligation to explicate its legal and factual rationale so as to demonstate that such decision is within the discretion vested in it by the Congress.

III. Whether the Board's factual findings herein are selective, arbitrary and dependent upon non-objective evidenve to the extent that its decision is not supported by substantial evidence.

IV. Whether the Board's Decision is based on a finding neither alleged in its complaint nor litigated at its hearing and thus derogates from elemental concepts of due process.

V. Whether the Board, in requiring union or other representation at an investigatory interview in a plant covered by a bargaining agreement containing detailed grievance and arbitration procedures of broad scope, has wrongfully invaded dispute settling methods which Congress intended to be worked out by the parties to a bargaining agreement; and has wrongfully attempted to dictate the terms of such an agreement.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case is before the Court upon a petition of the Union to reverse the decision of the Court of Appeals reported at 481 F. 2d 1018.

Based on an unfair labor practice charge filed by the International Ladies' Garment Workers' Union, Upper South Department, AFL-CIO, the Board issued a complaint against Quality. The complaint alleged that Quality violated Sections 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. §158(a)(1), (3) and (5) (hereinafter called the "Act") by refusing to allow an employee to be represented by the charging party at a meeting, and thereafter discharging said employee and two alleged representatives.

On January 28, 1972, a majority of a Board panel composed of Messrs. Miller, Fanning, Jenkins and Kennedy decided that Quality's denial of representation and termination of the three employees constituted a violation of Section 8 (a)(1) of the Act.

Member Kennedy dissented and would dismiss the complaint in part.

On July 19, 1973, the Court of Appeals reversed the Board in part and denied enforcement holding that as to such part Quality did not violate the Act. 481 F. 2d 1018.

FACTS

Respondent is a manufacturer of women's clothing and operates a plant at Point Pleasant, West Virginia, with approximately sixty production employees. The production employees are members of Upper South Department, of The International Ladies Garment Workers Union, AFL-CIO.

At all material times there was in existence a collective bargaining agreement negotiated between the Union and the Respondent, this is charging party Exhibit No. 1.

Article XXII of the agreement provides that the only people having power to act as an agent of the Union are the Manager of the Union or the designated business agent servicing the shop.

Article XXIII contains an elaborate grievance and arbitration procedure. Section 2 of the procedure provides that the procedure is the "exclusive means for the termination of all disputes, complaints, controversies, claims or grievances whatsoever, including claims based upon any breach of this agreement. It is intended that this provision shall be interpreted as broadly and inclusively as possible. Neither party shall institute any action or proceeding in a court of

law or equity, state or federal, other than to compel arbitration, as provided in this agreement, or to enforce the award of an arbitrator. This proceeding shall be a complete defense to any action of proceeding instituted contrary to this agreement."

The collective bargaining agreement does not provide for any right on the part of an employee to demand Union representation other than through the formal grievance procedure. There is no contention by any party that a grievance procedure was utilized by any party in connection with the events out of which this proceeding arises, except that at a later date grievances were filed over the alleged suspension and discharge of the three involved employees.

Catherine King was a production employee, a sewing machine operator, and she had made it a practice to visit the office of the President of the company daily and sometimes he (Mr. Gerlach) called her to his office as well.

The Respondent had a policy of requiring employees to obtain permission before leaving their work station. Alice Hoschar, President of the Union's local always obtained permission to leave the floor to discuss Union matters with management. (Trial Examiners Decision). Joel Goolst, business agent for the Union, testified that employees Mulford and Cochran were discharged because they came off the floor without permission. (Trial Examiners Decision). Mary Kathryn Gerlach, Respondent's Production Manager, testified with respect to the company rule that employees could not leave the work floor during working hours without first obtaining

permission. (Trial Examiners Decision). Lawrence Gerlach, Jr., General Manager of Respondent, testified to the rule that "nobody leaves the stitching room floor without permission." (Trial Examiners Decision). Larry Stephens, Respondent's secretary testified that Respondent had a rule that employees had to have permission to leave the sewing room floor during working hours, and that it had been enforced for a considerable period of time before 1969. (Trial Examiners Decision).

Incredibly, in the face of this uncontradicted evidence submitted by the General Counsel as well as the Respondent, the Trial Examiner made a finding of fact that the Respondent had no rule against leaving a work station without permission. (Trial Examiners Decision). It is readily apparent from the remarks of the Trial Examiner that he is confusing the question of the existence of the rule, with the contractual right of the Respondent to maintain such a rule and the legal right under the Act of the Respondent to have such a rule. It is undisputed from the evidence that the Union knew of the existence of the rule over many years and had never objected to it. There is nothing in the contract nor in the Act which forbids such a rule.

On October 10, 1969, Catherine King shut down her sewing machine and was causing a disturbance to the extent that two other employees had ceased their work. A supervisor directed King to resume her work, and King replied, "you tend to your business." The supervisor said, "Well, now we'll just go down and talk to Mr. Gerlach (President of the Respondent) about it."

Dolores Mulford was requested by King to accompany her. Mulford was a Chair Lady (steward), but she had no authority to serve as a Union representative except under the grievance procedure, which procedure was not involved. At Gerlach's office Mulford was directed to return to her work station because there was no grievance pending. Gerlach requested King to come into his office for a conference and she refused to go without Mulford. Mulford was suspended for two days for leaving her work station without permission.

Beginning on Monday, October 13, through Thursday, October 16, there were various conversations between King, Mulford, Martha Cochran, an Assistant Chair Lady who was also requested by King to represent her, and the President and Production Superintendent of the Respondent, Mr. and Mrs. Gerlach. Quality insisted on a conference with King alone, and King insisted that she be accompanied by Mulford or Cochran at any such conference. At the end of the discussions over this period of time, King, Mulford and Cochran had ceased to work with Quality contending that they had quit their jobs and the General Counsel contending that they had been discharged.

SUMMARY OF ARGUMENT

The Board's finding that Section 8(a)(1) of the Act was violated by Quality's denial of Union representation to an employee at a lawfully motivated investigatory interview prior to a decision to discipline and prior to a grievance being filed is contrary to law. And when, as here, the Board predicates such decision on a novel theory of law which sweeps aside

twenty-five years of case law, its failure to disclose and explicate its legal and factual rationale therefor is additionally and fatally deficient. Further, the Board's selective and arbitrary consideration of the facts and its reliance upon subjective "state of mind" evidence leaves the Board's decision unsupported by substantial evidence. Additionally, the Board's decision herein; resting as it does on whether an employee has reasonable grounds to fear that discipline might result from the investigatory interview; turns upon an issue neither alleged in its complaint nor litigated at its hearing and, thus, is in complete derogation of elemental concepts of due process. And finally, the Board, in superimposing its rigid requirement of Union representation over a bargaining agreement containing detailed grievance and arbitration procedures of broad scope has wrongfully invaded dispute settling procedures which Congress intended to be worked out by parties to collective bargaining agreements, and has unlawfully attempted to dictate the terms of such an agreement.

ARGUMENT

A. THE BOARD'S DECISION HEREIN IS IN DEROGATION OF THE DECISIONS OF THE UNITED STATES COURTS OF APPEAL INCLUDING THIS COURT: REPRESENTS AN UNWARRANTED AND EX POST FACTO DEPARTURE FROM ITS OWN DECISIONS: AND IS LEGALLY DEFICIENT IN SUPPORTING RATIONALE.

(1) *Over twenty-five years ago, this Court held that there is no right to have a union representative*

present at meetings to investigate employee misconduct before any grievance has arisen or been filed. In *NLRB* v. *Ross Gear & Tool Co.*, 158 F. 2d 607 (7 Cir. 1947), a female employee named Ford had engaged in a serious dispute with other employees. When several employees threatened to resign unless Ford was discharged, she was summoned to a supervisor's office to discuss the controversy. After Ford twice refused to attend unless accompanied by union representatives; she was discharged for insubordination. The Court rejected a Board determination that the discharge violated Section 8(a)(1) of the Act, commenting (158 F. 2d at P. 613):

> "The Board in its brief states: 'As the Board has pointed out the legality of Ford's dismissal turns upon the issue whether or not she was within her statutory rights in insisting upon the presence of the Union committee when Strecker ordered her to report to his office alone.' A decision of this issue favorable to the Board would mean that any employee could with impunity refuse to comply with a direction by management and in effect abrogate a rule such as the one here involved. Assuming that an employee has a right to be represented by the union in the discussion or presentation of a labor grievance with an employer, such a right does not exist in the instant case. This is so, in our view of the matter, because there is no basis for the contention that such a grievance was involved . . . "

The Court concluded that Ford's discharge "was for a lawful and valid reason" 158 F. 2d at p. 614. In the instant case, as in *Ross Gear,* the employee requested Union representation at an investigatory meeting; at a time before discipline was imposed or

even probable; and, of course, at a time before any grievance had arisen or was filed. From the time of *Ross Gear* to the present there has been no amendment to any relevant statutory privisions of the Act. Accordingly, the holding of *Ross Gear* remains valid, and governs this case.

(2) *From 1947 to 1963, the Board's General Counsel deferred to Ross Gear.* From 1947, the year of the *Ross Gear* decision, to 1963 there was no reported Board decisions involving union representation at pre-grievance meetings of the sort here involved. However, on four occasions, as reported in Administrative Opinions of the Board's General Counsel, the Board's General Counsel, in refusing to issue a complaint, affirmed that the Act accords a union no right to be present during an employer-employee meeting which precedes discipline and involves no adjustment of a grievance. Case No. 289, 29 L.R.R.M. 1454 (March 28, 1952); Case No. K-71, 37 L.R.R.M. 1076 (October 10, 1955); Case No. SR-2382, 52 L.R.R.M. 1181 (December 7, 1962); Case No. SR-2245, 52 L.R.R.M. 1083 (October 29, 1962).

(3) *Before, during and after the hearing and Trial Examiner's Decision in the instant case, the Board's consistent and long-standing view of the law would require dismissal of the complaint herein.* In *Dobbs Houses, Inc.*, 145 NLRB 1565 (1964), an employee was called in for an interview by her employer concerning reported misconduct. Her request that a union representative be present was denied, and at the conclusion of the interview, she was discharged. In dismissing the complaint, and finding the company had not violated Section 8(a)(1) of the

Act, the Board adopted the following finding of the trial examiner (145 NLRB at p. 1571):

> "I fail to perceive anything in the Act which obliges an employer to permit the presence of a representative of the bargaining agent in every situation where an employer is compelled to admonish or to otherwise take disciplinary action against an employee, particularly in those situations where the employee's conduct is unrelated to any legitimate union or concerted activity . . . "

Again, in *Elec. Motors & Specialties, Inc.*, 149 NLRB 1432 (1964), the Board concluded that an employee who had been called in for a disciplinary interview (149 NLRB at p. 1440):

> " . . . had not been called in connection with a pending grievance; (hence) her statutory and contract right to representation was inapplicable. The employee's right to representation *when she presents a grievance* is not violated when the employer calls her in for admonition or discipline." (Original emphasis.)

But in 1967, the Board decided *Texaco, Inc., Houston Producing Division,* 168 NLRB 361, the case relied upon by General Counsel in prosecuting the instant case. There, an employee was seen stealing company products by his supervisor. He was suspended almost immediately. Later, an investigatory interview was scheduled for the employee; and he requested that a union representative be permitted to attend. The company denied his resuest and advised him he need not continue with the interview. The employee chose to proceed, admitted the theft and received additional discipline. The Trial Examiner found no violation of Section 8(a)(5) of the

Act in that no grievance had yet arisen and, hence, the employee interview did not involve adjustment of a grievance. The Trial Examiner further concluded there had been no violation of Section 8(a)(1) of the Act because the employee could have filed a formal grievance and thereby assured himself of union representation. The Board reversed: finding that the company knew all the facts prior to the employee interview; that the interview was not investigatory in nature but more concerned with substantiating is case against the employee; that, by such interview, the company had unlawfully sought to deal directly with the employee on a matter affecting his terms and conditions of employment; and that, by denying the employee's request for representation, the company had violated Section 8(a)(1) of the Act.

Ten days after *Texaco-Houston,* above, the Board decided *Chevron Oil Company,* 168 NLRB 574 (1967), in which it held that exclusion of union representation from an employer-employee interview was not unlawful. There, a foreman had reported nine employees for leaving the job early. Investigatory interviews were scheduled and held. Employee requests for union representation at such interviews were denied. After the interviews, the company disciplined seven of the employees and exonerated two. The Board concluded that such a fact-finding meeting was merely an added effort on the employer's part to hear both sides of the story before reaching a decision, and pointed out that employees should not be shielded by a bargaining agent from company inquiries when management embarks upon an investigation to ascertain whether plant discipline has been breached. Likewise, in *Jacobe-Pearson Ford, Inc.,*

172 NLRB No. 84 (1968), the Board upheld the employer's denial of requested union representation at a proposed meeting between an employer and his procrastinating employee, finding that the meeting was called merely for the purpose of gathering information, even though the employer's pre-meeting conduct may have looked ominous to the employee.

In the meantime the United States Court of Appeals of the Fifth Circuit was reviewing the Board's decision in *Texaco, Inc., Houston Producing Division, supra,* and in 1969 denied enforcement of the Board's order therein, *Texaco, Inc., Houston Producing Division* v. *N.L.R.B.,* 408 F. 2d 142 (5 Cir. 1969), stating (408 F. 2d at p. 144, footnotes omitted):

> "After a careful study of the record, we can find neither basis in fact nor in law for the Board's conclusion that a union representative should have been permitted to be present during the interview. The evidence is overwhelming that the interview was investigatory in nature and there is absolutely no evidence that the comptroller sought to deal with Alaniz about the *consequences* of his alleged misconduct. The function of the interview was to question Alaniz, not to bargain with him.
>
> "The Board has properly recognized that an employee's right to union representation does not apply to all dealings with his employer which may eventually or ultimately affect the terms and conditions of his employment." (Original emphasis.)

Then, after citing and discussing the Board's intervening decisions in *Jacobe-Pearson* and *Chevron Oil,* above, the Court continued (408 F. 2d at p. 145):

"The result reached in these two cases would appear equally appropriate in the case *sub judice*. The Board's reason for finding otherwise is not entirely clear. It attempts to explain away the inconsistency by pointing out that in neither *Chevron* nor *Jacobe-Ford* had the employer committed himself to disciplinary action at the time of the interview. But as the Company urges in its brief and as it clearly appears from the record, the Company was not committed to disciplinary action. The foreman's suspension of Alaniz was conditional pending the outcome of an investigation and by no means *committed* the Company to a course of action. In any event, if an *interview is truly investigatory*, we see no reason why an employer's prior commitment to disciplinary action should necessarily transform it into a *collective bargaining session* requiring union representation." (Original emphasis.)

In the instant case, the attempted employee interview was investigatory in nature and Quality was not committed to discipline.

After the decision of the Fifth Circuit in *Texaco-Houston*, the Board decided three other cases involving similar denials of union representation. *Wald Manufacturing Company*, 176 NLRB No. 119 (1969); *Dayton Typographic Service, Inc.*, 176 NLRB No. 48 (1969); and *Texaco, Inc., Los Angeles Sales Terminal*, 179 NLRB 976 (1969). In all three cases, the Board dismissed complaints which included, as here, allegations that such denial of union representation violated Section 8(a)(1). The principle adopted by the Board in *Dayton Typographic* appears to represent its continuing sentiment throughout these cases. Thus, (*Dayton Typographic Service, Inc.*, 176 NLRB No. 48 at p. 9 of the Trial Examiner's Decision adopted by the Board):

"It is only where an employee is called into a discussion with management on a problem involving his performance, which has gone beyond the fact-finding or investigation state to a point where management has decided that discipline of that specific employee is appropriate, that the employer is required on demand of either the employee or his bargaining agent to permit that agent to be present."

In *Illinois Bell Telephone Company*, 192 NLRB No. 138, decided in August, 1971, a phone repairman was suspected of pilfering from a pay phone. He was interrogated; was told the money had been marked; and was made to put the money from his pockets under a flourescent light. Thereafter, he was interrogated again and his request for union representation was denied. Still later, he was told the money had been marked; and that the interrogator thought he, the employee, had that money. Then, the employee's money was again flouroscoped and he was told that his money was marked. The employee was then asked to sign a statement and the employee again asked for and was denied union representation. Later that day, the employee was suspended. The Trial Examiner's conclusion in *Illinois Bell Telephone* adopted by the Board, was that at the time of these interrogations no discipline had been decided upon; that the interrogation was fact-finding in nature; and that neither Section 8(a)(1) or (5) of the Act had been violated because "the case law seems clear that the Act exacts no obligation upon the Company to accord the employee the right to union representation at that level of discussion." *Illinois Bell Telephone Company*, 192 NLRB No. 138, at p. 5 of Trial Examiner's Decision.

Such was the state of the law as seen and consistently applied by the Board and Courts at the time of the Quality decision.

(4) *The Board decisions in Quality Manufacturing and Mobil Oil erase twenty-five years of case law under the guise of passing upon new issues.* In the case at bar, decided January 28, 1972, only five months after *Illinois Bell Telephone Company, supra,* an employee shut down her machine, and caused other employees to cease work. A supervisor told her to resume work and the employee challanged the supervisor's authority. The employee was then asked to report to the supervisor's office. She did, but brought along an employee-union representative who left her own machine without permission. The supervisor refused to talk to the employee other than in private. The employee declined to do so and both the employee and her union representative were told to return to work. On the next working day the union representative was suspended and the employee was again called into the supervisor's office. This time she brought along a different employee-union representative who accompanied the employee without receiving permission to not punch in for work. Again the employer refused to talk to the employee except in private and again the employee declined. After a repeat of these sequences, the Company discharged, among others, the employee for, as the Board found, insubordination for refusing to talk to management without union representation. In examining these facts the Board then twice engaged in pretense. The Board recited that the presence of a disciplinary discharge presented a distinguishing issue from prior cases; and further, that prior cases

involved only a refusal to bargain in violation of Section 8(a)(5) of the Act and not a violation of Section 8(a)(1) and the Section 7 rights of individual employees to act in concert for mutual aid and protection. The Board then blithely concluded that *Quality Manufacturing* presented an issue not heretofore directly passed on (195 NLRB No. 42 at pp. 6-7). None of this is true. *Ross Gear, supra,* decided by the Court, involved a similar discharge and a consideration of Section 7 rights. And in *Texaco, Inc., Houston Producing Division,* above, 168 NLRB at p. 362, the Board found that the employee's discipline was "tainted" by the company's denial of union representation and ordered him to be made whole. And, of course, all management orders to employees — including those considered by the Board in prior cases wherein employees were directed by supervision to cooperate in a private investigatory interview — carry with them the implicit threat of discipline. Further, in all the prior cases involving these investigatory interviews, a violation of Section 8(a)(1) was in fact alleged and passed upon by the Board. Indeed, such issue was specifically argued by the Board to this Court in *Ross Gear, supra,* 158 F. 2d at p. 611.

Thus, the Board in *Quality,* dismissed the product of twenty-five years of closely reasoned decisional law without any fresh insight on the workings of Section 8(a)(1) or Section 7 from the Congress. The sum and substance of the Board's substitute legal rationale is, "After reflection, we have concluded that it is a serious violation of an employee's individual right to be represented by his union if he can

only request or insist on such representation under penalty of disciplinary action." (195 NLRB No. 42, at p. 7). The Board cited no supportive legal authorities or legislative history. Nor did it engage in any analysis of the statutory provisions. Rather, it suggested as a "proper" course that such interviews be made voluntary so that the employee could refuse to participate if he has reasonable ground to fear that the interview would adversely affect his continued employment. It would appear that the Board again needs reminding that the Congress has not invested it with powers of a social arbiter or to rearrange union-employer relations into what the Board may prefer; but, rather, to determine whether the Act has been violated. And in the entire history of the law as developed above, the managemnt prerogative of conducting an investigatory interview such as Quality attempted herein has not been considered a violation of the Act. The language in the concurring opinion of Justices Stewart, Douglas and Harlan in *Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203 at pp. 225-26 (1964), is apt:

> " 'It is possible that . . Congress may eventually decide to give organized labor or government a far heavier hand in controlling what until now have been considered the prerogatives of private business management. That path would mark a sharp departure from the traditional principles of a free enterprise economy. Whether we should follow it is, within constitutional limitations, for Congress to choose. But it is a path which Congress certainly did not choose when it enacted the Taft-Hartley Act.' "

Similarly, this Court has stated that whether or not an employer is just or unjust, wise or unwise is not a matter for concern for the Board, *N.L.R.B.* v. *Kearney & Trecker Corp.,* 237 F. 2d 416, 419 (7 Cir. 1956); and that the Board should not substitute its judgment for what are basically managerial decisions, *N.L.R.B.* v. *Auto Industries, Inc.,* 313 F. 2d 858, 863 (7 Cir. 1963).

In *Mobil Oil Corporation,* 196 NLRB No. 144, the Board furnishes us with no further legal basis for its conclusion than in *Quality Manufacturing;* to wit, and stripped of its dross, that *it thinks* what Mobil did was a serious violation of the Section 7 rights of employees. A court of appeals has correctly reversed the Board in *Mobil Oil Corporation,* 482 F. 2d 842.

Based upon the foregoing, it is submitted that the Board's order herein must be denied enforcement for two reasons.

First, it is settled law that the Board, as well as any other administrative agency, must disclose the findings and analysis which support its decisional conclusions so as to give clear indication that it has exercised, and not exceeded, the discretion with which the Congress has empowered it. *Phelps Dodge Corp.* v. *N.L.R.B.,* 313 U.S. 177, 197 (1940); and see *Burlington Truck Lines, Inc.* v. *U.S.,* 371 U.S. 156, 167-168 (1962), and cases cited therein. The Board, it is submitted, has not done so in this case and its order herein must be denied enforcement on this ground alone. The need for the Board to furnish the courts with a detailed and reasoned analysis showing the relation of a respondent's alleged factual offense with the workings and rationale of the Act is particularly

important where, as here, the Board bases its decision on a novel theory of law which would cast aside some twenty-five years of case law by itself and the courts. And even more specifically, the need for such explication by the Board is further underscored by facts which tend to foster a natural skepticism of the *ex-officio* expertise of the Board majority below composed of Messrs. Miller, Fanning and Jenkins. The facts are that all three of these Board Members have joined in the dismissal of complaints on a legal theory which, on the basis of the Trial Examiner's undisturbed findings of fact, would have exonerated Quality's conduct herein; *i.e.*, the Board theory in vogue at the time of the hearing herein which was that an employee was not entitled to union representation at an investigatory interview if at the time, the employer was not committed o discipline. Thus, in *Chevron Oil,* Member Jenkins did so; in *Jacobe-Pearson Ford* it was Member Fanning; in *Wald Manufacturing* and *Texaco-Los Angeles* it was Members Fanning and Jenkins; and in *Illinois Bell Telephone,* decided after the hearing herein, it was Chairman Miller and Member Jenkins. Patently, these gentlemen have changed their minds. But they have failed to give any explanation meaningful in law as to why. This failure, it is submitted, precludes enforcement of their order.

Second, as developed above in the review and analysis of the twenty-five years of Board and court decisions prior to the novel theory of law upon which the Board rests its order herein, it is submitted that the rule of this Court in *Ross Gear, supra,* is correct and requires a conclusion that Quality did not violate Section 8(a)(1) of the Act.

B. THE FACTUAL BASIS OF THE BOARD'S FINDING THAT KING HAD REASONABLE GROUNDS TO FEAR DISCIPLINE IS SUBJECTIVE, ARBITRARY, DEFICIENT IN RATIONALE, AND MAKES FOR BIZARRE PROCEDURAL PROBLEMS.

In the case below Quality was charged with a violation of the Act for refusing the demand of King that she be accompanied by another employee during an interview by management. The Board found that King had personally requested representation, and that she had reasonable ground to fear that the interview could adversely affect her employment status. The Board completely fails to explicate its rationale. It did not explain why the personal request by King converted Quality's investigatory motivation into a violation of Section 8(a)(1). Is it that under the Board's new theory of law an employee can waive her rights under Section 8(a)(1)? The Board does not say. Is it that the employee's personal request for representation is regarded by the Board as the one requisite objective fact which shows her reasonable grounds to fear discipline? The Board does not say. Assuming that the Board would not restrict the protection of Section 8 (a)(1) only to employees who are vocally aggressive or knowledgable about their alleged rights under Section 8(a)(1), the Board must be saying that the employee herself, not anyone else, must have reasonable grounds to believe that the interview may result in her discipline; and, further, that her personal request for representation is the one distinguishing and essential objective fact which must be presented

to show she had reasonable grounds to fear discipline. And, of course, this reliance by the Board on an employee's personal request for union representation to show her reasonable ground for belief finds its root, as charged by the dissenting Board member, in the subjective state of mind of the employee making the personal request for representation. But the Board has consistently refused to receive, inquire into, or receive as evidence, the subjective state of mind of employees to determine whether the Act had been violated. *Cumberland Shoe Corp.,* 144 NLRB 1268 (1963), *enforced* 351 F. 2d 917 (6 Cir. 1965); *Levi Strauss,* 172 NLRB No. 57 (1968); and see *N.L.R.B.* v. *Gissel Packing Co.,* 395 U.S. 575 (1969) in which the Court stated (at p. 608):

> "We therefore reject any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry."

Further, as Chairman Miller of the Board recently stated in *Congoleum Industries, Inc.,* 197 NLRB No. 52 (1972) at p. 3 (Slip Op.):

> " . . . the decision herein should not turn on the subjective motivations of the employees. I would not attempt to probe the psyches of employees to determine whether it is fear, protest or other subjective intent which motivates their concerted activity."

On the basis of the foregoing, it is submitted that Board's order herein must be denied enforcement on a number of separate and additional grounds.

First, it has again failed to explicate and relate the significance of its factual findings to either the

language or intent of Section 8(a)(1) of the Act. This, and the Board's further failure to explain, or even consider, relevant facts and their relationship to each other and Section 7 of the Act again demonstrates that the Board has violated the rule of *Phelps Dodge, supra,* and like cases which mandate the Board to set forth sufficient findings and analysis to allow reviewing courts to determine whether the Board has acted within the discretion invested in it by the Congress.

Second, given the Board's new theory based upon the personal belief of the employee herself and the Board's failure to explain evidence relevant to such beliefs, it becomes evident that the Board's novel theory of law is not supported by objective substantial evidence; and further, that its finding that employee King had reasonable ground to fear that the interview might result in her discipline rests upon an attempted divination, unsupportable in fact or law, of the subjective state of mind of this employee.

Moreover, if the Board should choose to press its novel theory of the law in future cases the result could be procedurally bizarre. Thus, it appears patent that an employee's guilt or innocence of theft would be a prime objective fact in determining his apprehension over the investigatory interview. Guilt or innocence of the employee involved was not litigated in the hearing herein for the reason that it was irrelevant to General Counsel's theory of the case or Quality's defense thereto. However, for future cases it is well to consider that in Board proceedings the Board's General Counsel has the burden of proof. Will the General Counsel be required to show the

employee's guilt or guilty knowledge by a preponderance of the evidence? Will the testimony of, or the filing of an unfair labor practice charge by, an employee constitute a waiver of his Fifth Amendment rights? The possibilities are endless and incompatible with proceedings under a remedial, not a criminal statute.

It is suggested when the Board, with scant justification beyond "after reflection" kicks over twenty-five years of case law and, as developed below, the intent of Congress, only administrative confusion can be expected.

C. ENFORCEMENT OF THE BOARD'S ORDER WOULD DEROGATE ELEMENTAL CONCEPTS OF PROCEDURAL DUE PROCESS, BECAUSE SAID ORDER IS BASED ON A FINDING WHICH WAS NEITHER ALLEGED NOR FULLY LITIGATED AT THE HEARING BELOW

As noted above, the instant case was prosecuted by the General Counsel on the basis of *Texaco, Inc., Houston Producing Division, supra,* and cases following. Under that line of authority, the salient factors giving rise to an employee's right to representation are whether the interview was investigatory or disciplinary in nature; *i.e.,* whether or not the employer had decided upon discipline prior to conducting the interview.

At no time in the proceedings prior to the Board's decision in this case was Quality put on notice that

the theory of liability or violation would be other than that espoused in such line of authority.

Thus, the complaint in the instant case made no mention of the employee's alleged state of mind, or the existence of "reasonable grounds to fear" discipline at the time of the interview. Quality was thus not put on notice by the Complaint that the employee's pre-interview state of mind would be an issue — much less the issue — in the instant case. Counsel for the General Counsel tried this case on the theory that reflected the Board's then current view of the law; namely, that the interviews conducted by Quality were not investigatory; but rather, were for the purpose of obtaining disciplinary action. No indication whatever was given by the General Counsel at any time prior to or during the proceedings that the employee's state of mind, or fear of the purpose of the interviews, would be in any way a relevant issue. Thus, the Board's new and different theory of law would, of course, have demanded and elicited an entirely different set of proof.

Clearly then, it was thus not until well after the hearing, when the Board announced its brand new theory of liability, that Quality was made aware of the purported relevance of the "state of mind" issue.

Under the above circumstances, if for no other reason, this Court cannot grant enforcement to the Board's Order without doing violence to the most elemental concepts of procedural due process. *Russell-Newman Mfg. Co.* v. *N.L.R.B.*, 370 F. 2d 980, 984 (5 Cir. 1967). As was stated in *N.L.R.B.* v. *Cone Mills Corp.*, 373 F. 2d 595, 600 (4 Cir. 1967):

"If the Board's order is to be enforced, it must be on the theory of the complaint . . . "

In *N.L.R.B.* v. *H. E. Fletcher Co.*, 298 F. 2d 594, 600 (1 Cir. 1962), the Complaint had alleged violation of Section 8(a)(5) based on the purported failure of the Company to bargain in good faith with the union over wage increases. After the hearing, the Board also found a violation of 8(a)(5) based on the Company withdrawal of recognition from the union following a bargaining impasse. The Court refused to enforce this latter finding, based on the fact that the issue had not been mentioned in the complaint or litigated in the hearing. As the Court stated (298 F. 2d at 600):

"(T)he complaint is totally devoid of any allegation which would put (the respondent) on notice that the reasonableness of the post-settlement time interval was challenged. Consequently respondent presumably had every legitimate reason to believe that the question of whether or not a reasonable time had elapsed was not one of the issues in the case. The belief was undoubtedly confirmed by the opening statement of counsel for the General Counsel who stated at the hearing" 'The issue which is before you today is rather narrow and confined to whether or not the Company bargained in good faith with the charging Union with regard to the issue of wages.'

* * *

"... and, thereafter, at no time during the course of the hearing was there any contention made that respondent's refusal to recognize the Union beyond February 10, 1960, constituted a violation of Section 8(a)(5) and (1). In sum, the Board made a finding of a violation which was

neither charged in the complaint nor litigated at the hearing.

"We believe that it would derogate elemental concepts of procedural due process to grant enforcement to such a finding."

The issue is whether the respondent was fairly apprised, by the complaint or otherwise, of the significance of evidence of the employee's state of mind to the legal claim involved and thus afforded a reasonable opportunity to meet such evidence, and frame its own case accordingly. Evidence, of course, is not introduced blindly or haphazardly; but to meet the recognized legal elements which, taken together, constitute a violation of the law or a successful defense. Quality was afforded no such opportunity to defend in the instant case.

Accordingly, it is submitted that, the issue of "reasonable grounds to fear" discipline cannot be said to have been fairly litigated in this case. In *J. C. Penney Co., Inc.* v. *N.L.R.B.*, 384 F. 2d 479 (10 Cir. 1967), the Board found an independent Section 8(a)(1) violation based upon a supervisor's statement to an employee. This issue was not pleaded in the complaint. The Court noted that, even where an issue is not so pleaded, if it is "fairly tried" by the parties at the hearing, a finding of a violation may be proper. "But even so," said the Court, "we do not think this particular issue was ever injected into the lawsuit at the examiner's level." In *J. C. Penney*, the evidence of the supervisor's statement was an affidavit introduced over Respondent's objection at the hearing. The Respondent objected to the relevance of the document; the Trial Examiner voiced

his mystification as to its relevance; and the General Counsel explained it was introduced by way of background. The affidavit was accepted in evidence, but, as the Court noted, "nothing more was said concerning the violative nature of (the supervisor's) statement contained therein." (Id. at 483). The Court went on (Id. at 483):

> "From these facts we think it is clear the Board made a finding which was neither charged in the complaint nor litigated at the hearing. By Regional Counsel's own statement, it is manifest that the employer was never put on notice that (the supervisor's) purported statement standing alone was in issue, and that (the employee's) testimony and affidavit were introduced for the sole purpose of corroborating other evidence regarding the purpose of the wage increases (which wage increases were alleged in the Complaint as violative).
>
> * * *
>
> "Failure to clearly define the issues and advise an employer charged with a violation of the law of the specific complaint he must meet and provide a full hearing upon the issue presented is, of course, to deny procedural due process of law. NLRB v. Bradley Washfountain Co., 192 F. 2d 144 (7th Cir. 1951)."

In the instant case, as in *J. C. Penney,* Quality was not aware that a new issue had been injected into the hearing. In fact, this new issue became "relevant" only after the hearing had been closed for months. Clearly then, the issue of "reasonable ground to fear" discipline was never fully litigated at the hearing herein, and the Board's finding on this issue to support its decision that the Act was violated is in clear violation of minimum standards of procedural

due process, to Quality's obvious prejudice. For this reason alone, even if the Board's novel theory is accepted by this Court, the Board's order herein should be denied enforcement.

D. THE BOARD HAS EXCEEDED THE INTENT OF CONGRESS RELATIVE TO UNION REPRESENTATION AT EMPLOYER-EMPLOYEE MEETINGS; HAS INVADED THE AREA OF DISPUTE SETTLING PROCEDURES WHICH CONGRESS SPECIFICALLY LEFT TO THE PARTIES TO A BARGAINING CONTRACT:

Congress did not overlook or remain silent on the problem of union representation at employer-employee meetings. In Section 9(a) of the Act it gave employees the right to present grievances to their employer without intervention of their bargaining representative; provided that the bargaining agent be allowed to be present at the adjustment of any grievance to see that such adjustment is not inconsistent with the bargaining contract in effect. Clearly, the Congress in considering the area of union representation at employer-employee meetings, extended no specific statutory right to either employee or union that a representative be permitted to intervene in such meetings prior to a grievance being filed. And that the Congress did not impliedly extend such right of representation is attested to by the twenty-five years of case law on this problem, as presented and analyzed in Part A of this Argument. To the contrary, it is submitted that Congress intended representation disputes of the kind herein brought before this Court to be resolved in the dis-

pute settling procedures worked out by the union and employer parties to bargaining contracts.

Thus, also in 1947, the Congress enacted Section 203(d) of the Act which reads, in pertinent part, as follows:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. * * *"

And in 1957, the Supreme Court brought life to Section 203(d) and Section 301 of the Act, 29 U.S.C. §185 by holding that Section 301 not only gave federal courts jurisdiction over suits involving collective bargaining agreements but also authorized "federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements . . . " *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448, 451 (1957). In the host of lawsuits on the arbitration provisions in bargaining contracts which followed *Lincoln Mills,* the Supreme Court has repeatedly emphasized that the congressional policy embodied in Section 203(d) is to be strictly observed by the courts. Thus, in *United Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564 (1960), the Court referring to this congressional policy, stated (at p. 566):

> "That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play."

Moreover, on the scope of an arbitration clause the Supreme Court made it clear that all doubts should be resolved in favor of submitting a dispute to aribtration; stating that an order to arbitrate should not be refused "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582-83 (1960).

In its Decision and Order below, the Board neither mentions or considers any of the facts in the preceding paragraph. Yet in a decision made public on August 6, 1972; *Western Electric Company,* 198 NLRB No. 82; it would appear that Chairman Miller of the Board now considers such evidence as being crucial to the issue before this Court. In *Western Electric,* the company was charged with a violation of Section 8(a)(1) for denying employees union representation when they were interviewed by the company in the course of an investigation into employee misconduct. The Board panel was composed of Members Kennedy and Penello, and Chairman Miller. Members Kennedy and Penello dismissed the complaint on the grounds spelled out by Member Kennedy in his dissent in the instant case. Chairman Miller, who was part of the majority panel in the instant case, joined them in dismissing, but on different grounds. Mr. Miller noted that although the bargaining contract between the parties spelled out the various steps and participants in the contract's grievance procedure the parties had been unable to agree on whether the contract provided for union representation at investigatory interviews and had

twice submitted the issue to arbitration with results unfavorable to the union. Chairman Miller stated:

> "There remains only the question of whether an agreement which expressly, or through interpretation, operates to exclude union representation in investigatory interviews, is repugnant to the statute. Since, as indicated by the discussion, *supra,* we have regularly permitted parties, by agreement, to determine how representation rights shall be channeled during the life of a collective agreement, there would seem to be no basis for reaching a contrary result here. If the parties desire to change these channels in future negotiations, they are free to do so. Thus, if the employees should become convinced that representation in the course of these interviews is necessary as a part of their total protection from what they may view as a harsh or unfair application of the employer's disciplinary policies, they are free to seek this additional safeguard, and to refuse to authorize their agent to make an agreement which does not include such safeguards."

Chairman Miller mentioned none of those considerations in deciding the instant case. Yet the factors which were present in *Western Electric* were also present in the instant case.

In the instant case, the employee involved was covered by a collective bargaining agreement under which all grievances were subject to final and binding arbitration. And under this bargaining agreement a grievance was broadly defined. In the instant case, the Union filed a grievance but later abandoned it.

The only factor distinguishing *Western Electric* from the instant case, and we have no views from

Chairman Miller on its importance, is that in *Western Electric* the question of union representation at investigatory interviews has been arbitrated whereas in the instant case it could have been arbitrated. And this, it is submitted, is a distinction without a difference. The decisive factor, under the teachings of the Supreme Court, is whether a grievance is arbitrable and not whether a similar grievance has been arbitrated. Otherwise, no new issue would ever reach arbitration. As the Supreme Court stated in *United Steelworkers of America* v. *American Manufacturing Company,* 363 U.S. 564, 567-568 (1960):

> "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for."

The mandate of Section 203(d) is flexibility for the contracting parties to work out their own dispute settling procedures. Quality and the Union have done so herein. For the Board to impose a rigid requirement as to when, how, or by whom union representation should take place is in complete derogation of this congressional intent. And, of course, the issue of union representation here before this Court is not a novel one for arbitrators to decide. To the contrary, it is grist for the arbitral mill. See, e.g.,

United Air Lines, Inc., 28 LA 179 (1956); *E. I. duPont de Nemours & Co.*, 29 LA 646 (1957); *Erwin Mills, Inc.*, 43 LA 31 (1963).

Moreover, Chairman Miller, in his concurring opinion in *Western Electric, supra,* can only be taken as finally conceding that the precise aspect of union representation before this Court is a proper subject for bargaining. This being the case, it is submitted that the Board decision herein would require Quality to accede to the Union's demand for a bargainable condition of employment and, hence, is in contravention of the Supreme Court's mandate in *H. K. Porter Corporation, Inc.*, v. *N.L.R.B.*, 397 U.S. 99 (1970) that neither a union nor an employer may be compelled to agree to a proposal or the making of a concession.

The Court of Appeals in Quality correctly held that King had no right to have a union representative present at the requested meetings with her employer. Thus, Quality did not violate Section 8(a)(1) of the Act. The Court held:

> "And it would appear that the entire history of the law as developed above, the management prerogative of conducting an investigatory interview such as Quality attempted here has not been considered a violation of the Act."

Courts of Appeals have reached similar conclusions in Mobil Oil Corp., 482 F. 2d 842 (C.A.7) and J. Weingarten, Inc., 485 F. 2d 1135 (C.A.5).

CONCLUSION

For all of the foregoing reasons, and each of them, the petition for enforcement of the Board's Order should be denied and the Court of Appeals order affirmed.

Respectfully submitted,

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August, 1974

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Supreme Court, U. S.
FILED
NOV 6 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-765

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, UPPER SOUTH DEPARTMENT, AFL-CIO, *Petitioner*

v.

QUALITY MANUFACTURING COMPANY and NATIONAL LABOR RELATIONS BOARD

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-765

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, UPPER SOUTH DEPARTMENT, AFL-CIO, *Petitioner*

v.

QUALITY MANUFACTURING COMPANY and NATIONAL LABOR RELATIONS BOARD

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONER

I. PRECEDENT

The Company's pervasive theme is that the Board's decision in this case "erase[d] twenty-five years of case law" (br. p. 16), graven in stone, as fixed and immovable as a fundamentalist's reading of scripture, impervious to evolution or fresh insight. As we

have shown in our brief (pp. 28-36), and the Board in its in *Weingarten* (pp. 25-27), this version of the actual state of precedent is overdrawn almost to the point of caricature, and the immobility ascribed to law is alien to its inherent receptivity to reasoned change. We add a few words.

The illusion sought of abrupt departure from ironclad precedent may be dispelled by a clear look at the cluster of three cases which is at the beginning point of the Board's serious consideration of the subject. The core issue in each case was ascertainment of the stage in the disciplinary process when the statute enjoins on the employer a mandatory affirmative obligation to meet with the union. The first is *Texaco, Inc.,* 168 NLRB 361 (1967), enforcement denied, 408 F.2d 142 (C.A. 5, 1969). It is that case which marks the Board's initial determination that an employer has an obligation to bargain collectively with the representative of his employees at a disciplinary interview called by him. The second is *Chevron Oil Co.,* 168 NLRB 574 (1967), decided ten days after *Texaco,* in which the Board affirmed a Trial Examiner's decision that an employer had no obligation to meet with a union representative at "fact-finding meetings" (*id.* at 579). It is that case which marks the Board's initial determination distinguishing a disciplinary interview from an investigatory interview in ascertaining whether an employer is duty-bound to meet with the representative. The third case is *Jacobe-Pearson Ford,* 172 NLRB 594 (1968), decided seven months after *Texaco* and *Chevron,* in which the Board sealed the distinction, holding that an employer "did not breach any statutory obligation in denying union representation" to an employee at a "fact-finding meeting", observing that the " 'potential' for disciplinary action was remote and the purpose of the meeting essentially for the gathering of information", and inviting attention to the distinction between *Texaco* and *Chevron* (*id.* at 595 and n. 5).

Until the instant case, the cases which followed *Texaco-Chevron-Jacobe-Pearson* all applied the distinction drawn in that trilogy between disciplinary and investigatory interviews *for the purpose of ascertaining whether the employer was obliged to meet with the representative.* Until this case there was no occasion to consider any other rationale. For, after *Texaco* and until this case, it is fair to say that no employer sought to *coerce* an employee's unrepresented participation in an investigatory interview. The issue rather was whether the employer was statutorily required to meet with the representative at an investigatory interview, not whether the employer was statutorily free to compel the employee to participate in an investigatory interview without the union representative. Thus, as the Board observed of *Texaco* in this case, "[i]n *Texaco* . . ., when the employee asked to be represented in the interview, the employer advised that it would not insist on the interview unless the employee was willing to enter the interview unaccompanied by his representative" (P. 6a). And in *Chevron,* while the employee was told that he would not have the assistance of a union representative at a "fact-finding session", he was also "advised that he may stand mute . . ." (168 NLRB at 577). But in this case freedom to refrain from unrepresented participation at an investigatory interview was not accorded the employee, but she was instead subjected to naked coercion to compel her participation without the presence of her union representative.

Nothing in the cases formulating and applying the distinction between disciplinary and investigatory in-

terviews for the purpose of determining whether the employer has an affirmative duty to meet with the representative furnishes any precedent for allowing an employer to coerce an employee's unrepresented participation in an investigatory interview. We may test this proposition by asking the simple question which this case presents. Is an employer at liberty to discharge or suspend an employee and her fellow-employees who are her union representatives where (1) the employer discharges the employee because she declines to submit to questioning by her employer which she reasonably believes may lead to disciplinary action against her unless she is accompanied by and has the assistance of her union representative at the interview, and (2) the employer suspends one union representative, and suspends and later discharges another union representative, because they seek to furnish the representation asked of them by their fellow-employee? No precedent supports a "yes" answer to that question. A competent lawyer perceptively reading the "case law" could not prudently counsel an employer that he would run no significant risk by firing the employee and her fellow-employees. The issue, if it cannot be said to be wholly free of adverse precedent, can surely be said not to be foreclosed by precedent.[1]

[1] As we have shown in our brief (p. 28), the three cases preceding *Texaco* are simply unpersuasive. Nevertheless, driving the concept of precedent into the ground, an *amicus* brief goes so far as to urge Congressional adoption of the "rule" it espouses, citing for this purpose absence of "evidence of Congressional displeasure" with the decision of the Court of Appeals for the Seventh Circuit in *N.L.R.B.* v. *Ross Gear & Tool Co.*, 158 F.2d 607, 611-614, decided on January 2, 1947, preceding the 1947 and 1959 amendments of the National Labor Relations Act, and setting aside the Board's decision in 63 NLRB 1012, 1033-34 (1945) (CC br. p. 10). There is no evidence that any member of Congress even knew of this obscure decision. If knowledge is assumed, there is no evidence of approval of it. For aught that appears, the reversed Board decision was preferred, with the matter of resolving the difference left to additional litigation without the need for legislative intercession at this nascent stage. This Court has declined on a much more persuasive showing of agency practice "to conclude as a general proposition that whenever Congress reenacted without change provisions of the National Labor Relations Act it thereby froze administrative decisions rendered under those provisions." *N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 351 (1953). A single court reversal of an agency decision surely does not freeze the issue in the judicial mould via assumed approval from Congressional inaction. "It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law." *Girouard* v. *United States*, 328 U.S. 61, 69 (1946).

For the purpose of fortifying the illusion of monolithic precedent, the same *amicus* brief would have it that the "Board's summary affirmance of a law judge's decision must necessarily constitute complete agreement with that decision and *its rationale*" (CC br. p. 7, emphasis in original). This is nonsense. It would be artificial in the extreme to suppose that summary affirmance constitutes endorsement of all the rhetoric, turn-of-phrase, and nuance of the law judge's opinion. It is even more pertinent of an agency's adoption of a law judge's decision than of the agency's own opinion to remember that "[h]owever general or loose the language of opinions, the specific situations have controlled decision." *Hughes* v. *Superior Court*, 339 U.S. 460, 465 (1950). As this Court has said of its own summary affirmances, while "obviously . . . of precedential value", they "[e]qually obviously . . . are not of the same precedential value as would be an opinion of this Court treating the question on the merits." *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974).

II. RATIONALE

The Company would fault the Board on the ground that it has failed to "disclose the findings and analysis which support its decisional conclusions so as to give clear indication that it has exercised, and not exceeded, the discretion with which Congress has empowered it" (br. p. 19). The Board has amply articulated the rationale on which its decision rests (our br. pp. 8-12). It has therefore fully discharged its responsibility that

"the statute speak through the Board where the statute does not speak for itself." *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 196 (1941). See also, *Republic Aviation Corp.*, v. *N.L.R.B.*, 324 U.S. 793, 801-803 (1945).

Accordingly, the issue is, not whether the Board has sufficiently explicated the basis for its determination, but whether that determination has reasonable warrant. We turn to this question.

A. Concerted Activity for Mutual Aid or Protection

The Board confines the employee's right to be free of coerced attendance at an interview without union representation to the situation where the employee requests representation (our br. p. 10). In stressing the to-be-interviewed employees' "personal request for representation" (Co. br. p. 12), the Company may be suggesting that no concerted activity for mutual aid or protection within the purview of section 7 exists if an individual request for representation is the factor which brings the protection into play. An *amicus* brief makes this argument more directly (CC br. pp. 16-18). We turn to it.

The crux of the idea of concerted activity for mutual aid or protection was expressed by this Court in *Houston Insulation Contractors Assn.* v. *N.L.R.B.*, 386 U.S. 664, 668-669 (1967), quoting with approval from Judge Learned Hand's opinion in *N.L.R.B.* v. *Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505-506 (C.A. 2, 1942):

> When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and go out on strike in his support, they engage in a "concerted activity" for "mutual aid or protection," although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each one of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is "mutual aid" in the most literal sense, as nobody doubts.

Accordingly, it makes no difference that the to-be-interviewed employee initiates the request for union representation and may be the "only one . . . who has any immediate stake in the outcome." For what the individual employee seeks is the assistance of another. When the two make "common cause" in confronting the employer—the one being helped by the other in coping with his predicament—they are engaged in concerted activity in the most literal sense. They are acting in common. And the concert is all the plainer when it is *union* representation which is sought. For the employees as an entirety have pooled their interests for the precise purpose of enjoying the enhanced protection of institutional strength that comes from union representation. The very fact that it is a union representative's help that is being sought is an exact manifestation of activity in concert, for the employees have joined in a union to get from each other just this sort of united effort when one of them is in trouble. As shop chairlady Delila Mulford stated when the Company refused to have her represent Catherine King, "Catherine paid her dues and she was entitled to [have me] be there" (A. 47). After Mulford was suspended, assistant shop chairlady Martha Cochran took over the attempted representation of King, and in answer to the Company's question why she was there

"with King," she replied, "I was a union steward and that was my duty" (A. 27).

Concerted activity is thus clear, and so is mutual aid or protection. For the one who comes to the aid of the other in his individual predicament "assures himself, in case his turn eve comes, of the support of the one" then being helped. This mutual aid or protection is the essence of alliance of workers in a union. They seek and get each other's aid, and they institutionalize their reciprocal support by selecting one among their number to represent them. The "solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts." That is what union representation is all about.

It of course makes no difference that the Board confines the employee's right to be free of coerced attendance at an interview without union representation to the situation where the employee requests representation. The Board has simply given the employee an option, to go it alone if that is what he prefers, or to invoke the aid of union representation if that is what suits him. When the employee chooses union representation, refusing to participate in an interview unless accompanied by his representative, he is exercising his guaranteed right to engage in concerted activity for mutual aid or protection, as nobody should doubt. That he is free to forego that protection is no reason to say that he does not have it when he does desire to avail himself of it.

B. Reasonable Grounds To Believe

The Board limits statutory protection to the employee who "has reasonable grounds to believe that the matters to be discussed [at the interview] may result in

his being the subject of disciplinary action" (P. 9a). The Company frenetically objects that this standard requires inquiry into "the subjective state of mind" of the employee and is unworkable (Co. br. pp. 21-24).

To require that a belief be based on "reasonable grounds" is the antithesis of subjectivity. Thus, in explaining the basis for the qualified immunity of executive officers for acts performed in the course of official conduct, this Court stated that existence of immunity requires "*reasonable grounds for the belief* formed at the time and in the light of all the circumstances, coupled with good faith belief . . . ." *Scheuer* v. *Rhodes,* 416 U.S. 233, 247-248 (1974) (emphasis supplied). Similarly, workers who engage in what would otherwise be a breach-of-contract strike are free of fault when "abnormally dangerous conditions for work" are the reason for their act, but only if their belief is supported by "'ascertainable, objective evidence . . . .'" *Gateway Coal Co.* v. *United Mine Workers,* 414 U.S. 368, 386, 387 (1974). A "reasonable grounds for belief" standard, routinely applied in other fields designedly to prevent subjectivity from controlling, does not suddenly become unspeakably objectionable when it is an employee's apprehension of disciplinary action which is under inquiry

As the Board has stated, "'reasonable ground' will of course be measured, as here, by objective standards under all the circumstances of the case" (P. 6a, n. 3). This is not a risk-free criterion for either the employee or the employer. But there are no risk-free criteria. The best that is manageable is a reasoned judgment based on objective perception of external circumstances. That is generally good enough. It is surely no more difficult to determine an employee's "reason-

able grounds" for apprehension than it is to determine whether an employer's interview is investigatory or disciplinary. The latter dichotomy is hardly self-illuminating. Application of the "reasonable grounds" for apprehension standard can therefore cause an employer no more difficulty than application of the investigatory/disciplinary interview standard.

But on this issue a page of experience is worth a volume of rhetoric. For the fact is that as a matter of everyday actual industrial practice employers routinely apply just the procedure that the Company complains is unworkable (our br. pp. 23-25). What works cannot be contested as unworkable.[2]

[2] An *amicus* brief points to the Board's decision in *Mobil Oil Corp.*, 196 NLRB 1052 (1972), as an example of unworkability (CC br. pp. 15-16). It is, however, only an example of the misreading of a case. The case before the Board involved four employees, Smith, Burnett, Matthews and Hill. The Board found no violation as to Matthews and Hill because "each failed to request union representation prior to or during their respective interviews . . ." (*id.* at n. 2). A violation was found as to Smith and Burnett because each "had reasonable grounds to fear they were suspected of theft", and therefore their requests for union representation at the interview should have been honored if their compulsory participation in the interview was to be exacted (*id.* at 1052). Contrary to the statement in the *amicus* brief, the Board did not find that the discharges of these two employees were unlawful; their discharges were based on alleged theft by them, not for exercise by them of any statutorily protected right, and were thus subject solely to a grievance under the collective bargaining agreement to determine their validity. The Board consequently entered only an *in futuro* order requiring the employer to "desist from requiring that any employee take part in an interview or meeting without union representation, if such representation has been requested by the employee and if the employee has reasonable grounds to believe that the matters to be discussed may result in his being subject to disciplinary action" (*ibid.*). None of this is evidence of unworkability.

III. COLLECTIVE BARGAINING

The Company claims that "Congress intended representation disputes" over attendance at investigatory interviews "to be resolved in the dispute settling procedures worked out by the union and employer parties to bargaining contracts" (br. pp. 29-30). The argument takes a number of different turns not easily followed. We attempt to identify what seems to be the gist of each facet and to meet it.

1. The Company may be saying that protection from coerced attendance without union representation at an interview in which the risk of discipline reasonably inheres is not conferred by the statute but can be secured only by contract. We have already addressed that argument and do not repeat our comments (our br. pp. 26-27). The protection is vouchsafed by statute, and the employer has no "option of bargaining concerning a matter guaranteed the employee as of right. . . ."[3] If the right is obtainable only by contract, the supreme irony that would result is that those employees will have protection who are represented by strong unions and need it least, and those employees will be denied protection who are represented by weak unions and need it most. The Act insulates the protection conferred by union representation from the economic arena and safeguards it statutorily precisely because it does not countenance a contest over the underlying need to give workers the opportunity to

[3] *McQuay-Norris Mfg. Co.* v. *N.L.R.B.*, 116 F.2d 748, 751 (C.A. 7, 1940).

deal on equality with their employer (our br. pp. 20-23, 35-36).[4]

2. The Company appears to claim that the validity of coercing an employee's participation without union representation in an interview in which the risk of discipline reasonably inheres is an issue that should have been decided by an arbitrator in arbitration under the collective bargaining agreement and not by the Board in an unfair labor practice proceeding under the National Labor Relations Act. The argument is devoid of merit. First, "the arbitrator has authority to resolve only questions of contractual rights",[5] so that it is bootless to refer to him the separate question of the independent existence of the statutory right over which he has no power. Determination of the statutory right is at the heart of this case and the Board alone can initially decide it. And the Board has specifically declined to refer this question of statutory right to arbitration. *J. Weingarten, Inc.*, 202 NLRB No. 69 (1973), in Board's petition for a writ of certiorari in *N.L.R.B.* v. *J. Weingarten, Inc.*, No. 73-1363, p. 27A, n. 9. Second, the Company did not urge referral to arbitration at any time before either the Trial Examiner or the Board. Even where referral is otherwise thought appropriate (see *Collyer Insulated*

[4] An *amicus* brief argues not only that the protection is obtainable solely by contract but that negotiation to secure that protection "is not a mandatory subject of bargaining . . ." (CC br. p. 22). This *amicus* stands alone in espousing such primitivism, all others freely granting that at the least the employees have a statutory right to bargain and strike for contractual protection.

[5] *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 53-54 (1974); see also, *U.S. Bulk Carriers* v. *Arguelles*, 400 U.S. 351 (1971); *McKinney* v. *Missouri-Kansas-Texas R. Co.*, 357 U.S. 265, 268-270 (1958).

Wire, 192 NLRB 837 (1971)), the Board will not stay its hand where the employer "neither pleaded nor attempted to litigate affirmatively the *Collyer* deferral-to-arbitration defense." *Nedco Construction Co.*, 206 NLRB No. 17, 84 LRRM 1205 (1973); *MacDonald Engineering Co.*, 202 NLRB No. 113, 82 LRRM 1646, 1647 (1973); *Asko Inc.*, 202 NLRB No. 30, 82 LRRM 1498, 1500 (1973); *Erie Strayer, Co.*, 213 NLRB No. 45, 87 LRRM 1162, n. 1 (1974). Third, since the issue of referral to arbitration was not raised before the Board, judicial review of the matter is in any event barred. *N.L.R.B.* v. *Ochoa Fertilizer Corp.*, 368 U.S 318, 322 (1961)[6]

[6] The Company's plea that the issue should have been determined in arbitration is disingenuous for an additional reason which does not appear of record. The record shows that the discharges of employees King, Mulford, and Cochran were grieved and that arbitration was invoked by the Union (A. 109-110, 111-112). The following facts not of record show that the Company aborted the arbitration proceeding. On November 14, 1969, in accordance with the terms of the agreement (A. 195-196), the Union wrote to the American Arbitration Association requesting "the selection of an Arbitrator under the Rules of the Association", identifying the "issues to be arbitrated . . . as follows:"

1. Lockout on or about November 1, 1969.
2. Discharge of Catherine E. King.
3. Discharge of Delilah Mulford.
4. Discharge of Martha Cochran.
5. Grievance of Delilah Mulford for suspension on October 13, 14 and 15, 1969.
6. Grievance of Martha Cochran suspending her on October 13, 14 and 15, 1969.
7. Failure to pay Health and Welfare and Pension Funds retirement and severance payments between April 15 and May 31.
8. Failure to abide by Article XIX—Access to Shop.

The Company did not respond to the arbitration request or any of the correspondence addressed to it by the American Arbitration

3. The Company may be arguing that the Union in its collective bargaining agreement with the Company waived the protection the statute confers. Again the Company did not raise the issue before the Board and is therefore precluded from asserting it for the first time on judicial review. But assuming the merits are reachable, the argument is untenable.

The Company assumes that waiver is available, but only one member of the Board has addressed that issue and concluded in favor of waiver (*Western Electric Co.*, 198 NLRB No. 82, 80 LRRM 1705, 1707 (1972)), so that this fundamental threshold question is still undetermined by the Board, and the objections to waiver are very formidable. See, *N.L.R.B.* v. *The Magnavox Co.*, 415 U.S. 322 (1974). Putting this hurdle to the side, there is no possible basis for as-

Association. Accordingly, the Association appointed G. Allen Dash, Jr., to serve as Arbitrator, and scheduled a hearing for February 26, 1970. Several days before the hearing, the Company informed the Union that it had retained an attorney to represent it, that the attorney had been hospitalized by a heart attack, and that a postponement of the hearing would therefore be required. Upon the Union's verification of the information, it agreed to a continuance, and the hearing was reset for March 23, 1970. On March 10, 1970, the office of the Company's attorney informed the Union's counsel that the attorney would be unavailable indefinitely. The Association was informed of this development. The Union sought to persuade the Company to set a new hearing date and to retain new counsel. The Company refused. Meanwhile, to prevent the running of the six-month period of limitations prescribed by section 10(b) of the National Labor Relations Act, the Union on March 19, 1971 filed the unfair labor practice charge which underlies this proceeding, and upon advice from the Regional Director that the charge had merit and would be prosecuted, the Union discontinued its efforts to pursue its arbitration demand. The Board will not defer to an arbitral remedy where a party, although professing to desire arbitration of the dispute, engages in "foot dragging" delaying reasonably prompt arbitration. *Medical Manors*, 206 NLRB No. 124, 84 LRRM 1421, 1422 (1973).

serting that the statutory right has been surrendered. It is settled law that contractual relinquishment of a statutory right "must be clear and unmistakable and will not be extended by implication . . . ."[7] Nothing in the agreement evinces any showing, much less a "clear and unmistakable" showing, of waiver. On the contrary, the very breadth of its adjustment procedure manifests an intention to preserve every right of union representation at every level of the employment relationship (P. 37a-38a; A. 195-196):

> 1. Any and all disputes, complaints, controversies, claims, or grievances whatever between the Union or any employees and the Employer which directly or indirectly . . . relate to . . . the acts, conduct, or relations between the parties shall be adjusted as follows: (a) The Shop Chairlady, . . . together with a representative of the Union, shall attempt to settle the matter with a representative of the Employer . . . . 2. It is intended that this provision shall be interpreted as broadly and inclusively as possible.

Based on this provision the Trial Examiner concluded that the interview which the Company requested that employee Catherine King attend alone, "regardless of whether actual disciplinary measures are imposed thereat, is so intimately connected with working conditions that, *under the contract*, King was entitled to be represented by a representative of the Union during the course thereof" (P. 46a, emphasis supplied). It is thus plain that, whether or not the protection of

[7] *Morton Salt Co.* v. *N.L.R.B.*, 472 F.2d 416, 420 (C.A. 9, 1972), judgment vacated on another issue, *sub nom. International Association of Machinists and Aerospace Workers* v. *O'Reilly*, 414 U.S. 807 (1973). See also, *Kellogg Co.* v. *N.L.R.B.*, 457 F.2d 519, 525 (C.A. 6, 1972), cert. denied, 409 U.S. 850 (1972).

union representation had been conferred by contract, it surely was not relinquished by contract.

4. The Company contends that, when Congress in section 9(a) of the National Labor Relations Act conferred exclusive representative status on a union "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment," it excepted from this exclusivity the right of an employee or group of employees "to present grievances to their employer" within specified limits, and therefore by negative implication Congress "extended no specific statutory right to either employee or union that a representative be permitted to intervene in . . . [employer-employee] meetings prior to a grievance being filed" (Co. br. p. 29).[8]

Section 9(a) and its provisos are beside the point in this case. The right of an employee to be free of compulsory attendance without union representation at an interview with his employer which he reasonably believes may result in his subjection to discipline rests on section 7 of the Act. This is not a right in the employee to compel the employer to negotiate with either the

[8] Section 9(a) of the National Labor Relations Act provides that:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

employee or his union. The employer need not meet with either. But it is a right in the employee not to be coerced into meeting alone with the employer. The employer cannot be compelled to meet with the union representative but neither can he compel the employee to meet without the union representative. The source of this right is section 7; it does not depend on section 9(a) or its provisos; it is not diluted by section 9(a) or its provisos.

This is demonstrable analytically. For the right exists in the absence of any union in the picture, much less a union entitled to exclusive representative status. Thus, if an employee is summoned to a meeting with his employer in which the risk of discipline reasonably inheres, he may insist without risk of reprisal upon being accompanied by a fellow-employee to assist him, for the two would be engaged in concerted activity for mutual aid or protection within the safeguard of section 7 (*supra*, pp. 6-8). ". . . [E]mployees . . . have the right to engage in concerted activities for their mutual aid or protection even though no union activity be involved, or collective bargaining contemplated." *N.L.R.B.* v. *Phoenix Mutual Life Ins. Co.*, 167 F.2d 983, 988 (C.A. 7, 1948), cert. denied, 335 U.S. 845 (1948).

But even were it true that the right is dependent upon the existence of a statutory obligation in the employer to meet with the union at an investigatory interview, we have already shown that such an obligation does exist (our br. pp. 32-33). Section 9(a), in conjunction with sections 8(a)(5) and 8(d), is the source of that right, and to whatever extent the provisos subtract from the union's exclusivity when an employee chooses to go it alone, the provisos surely do not detract from the employees' right to union representation when he prefers his union's help.

IV. PROCEDURAL DUE PROCESS

The Company contends that the Board formulated the employee's "reasonable grounds to believe" standard only after the Trial Examiner's decision, and therefore it had no notice of or an opportunity to meet the issue of the reasonableness of the employee's basis for apprehension at the evidentiary hearing (Co. br. pp. 24-29). Notice and an opportunity to be heard are of course basic. But the Company's claim that these protections were denied it is totally abstract, for it particularizes no evidence that it could or would adduce at a hearing on this issue that it did not in fact present. "The Constitution protects procedural regularity, not as an end in itself, but as a means of defending substantive interests." L. Hand, J., in *Fay* v. *Douds*, 172 F.2d 720, 725 (C.A. 2, 1949). "Nebulous and declamatory assertions, wholly unspecified," do not show denial of the procedural means to defend substantive interests. *Ibid.*

Thus, at no stage of the proceeding—either before the Board, the Court of Appeals, or to this day before this Court—has the Company concretely identified a single item of evidence that is omitted from the record that it would have adduced had it been seasonably forewarned of its materiality. *First,* regardless of any theoretical deficiency in the identification of any issue, at the hearing itself the parties fully and meticulously adduced all the evidence relating to the entirety of the underlying situation. There was nothing left out pro or con pertaining to any event. But if anything was missed, and its relevance was not discernible until the Board articulated its "reasonable grounds to believe" standard, the Company under the Board's rules still had a full opportunity to adduce the evidence by moving the Board to reopen the record to receive it.[9] No such motion was made; the Board was never apprised in any way of what it should have considered that it did not. The Board cannot be convicted of denial of due process when it was never informed that any further process was sought. See, *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793, 804 (1945).

Second, having failed to object to the supposed deficiency before the Board, although full opportunity to do so existed, judicial review of the issue is precluded. *Glaziers' Local No. 558* v. *N.L.R.B.*, 408 F.2d 197, 202-203 (C.A.D.C., 1969). But if it were not, the Company was as silent before the Court of Appeals as it had been before the Board when it came to concrete particularization of any omitted evidence. It identified nothing, contenting itself instead with glittering generalities about the requirements of procedural due process, but not explicating in what specific way it had been denied. It did not apply to the Court of Appeals for leave to adduce additional evidence before the Board, in which

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[9] Section 102.48(d)(1) of the Board's Rules and Regulations (29 C.F.R. 102.48(d)(1)) provides that:

> A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on. A motion for rehearing shall specify the error alleged to require a hearing *de novo* and the prejudice to the movant alleged to result from such error. A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

application it would have had to "show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board . . ." (NLRA, § 10(e));[10] nor did it make any showing on brief. It left the Court of Appeals as uninformed as the Board.

Third, the Company's abstraction continues before this Court. It is still silent as to any specifics. It has "not yet suggested what . . . [it] could have added to the hearing by way of facts . . . ." *Humphrey* v. *Moore,* 375 U.S. 335, 350-351 (1964). The Company presents a frame without a picture. The emptiness of the Company's argument is patent. Were it to prevail, the relief it would obtain would be a remand to the Board to adduce the additional evidence it claims should be considered. What evidence? What does the Company propose to adduce at a reopened hearing? A remand to receive no evidence is a futile exercise. "If there is nothing to hear, then a hearing is a senseless and useless formality." *N.L.R.B.* v. *Air Control Products of St. Petersburg,* 335 F.2d 245, 249 (C.A. 5, 1964).[11]

V. RETROACTIVE APPLICATION

An *amicus* brief contends that in this case "the Board has engaged in the meretricious practice of retroactively imposing its new rule so that an employer's conduct, lawful before the issuance of that decision pursuant to rules then in effect, was rendered illegal because of that decision" (CC br. p. 24). The Company, however, has made no such contention, either before this Court, the Court of Appeals, or the Board. Judicial review of the issue would be barred were the Company to tender it, and it is surely not open to an *amicus* to inject an issue which a party itself could not. It is not the office of an *amicus* to raise issues that the parties did not; questions presented by it but not by the parties will not be considered. *Knetsch* v. *United States,* 364 U.S. 361, 370 (1960).

[10] *Consolidated Edison Co.* v. *N.L.R.B.,* 305 U.S. 197, 226 (1938); *Southport Petroleum Corp.* v. *N.L.R.B.,* 315 U.S. 100, 104-105 (1942); *Republic Aviation Corp.* v. *N.L.R.B.,* 324 U.S. 793, 804 (1945).

[11] See also, *N.L.R.B.* v. *Griffith Oldsmobile,* 455 F.2d 867, 868-869 (C.A. 8, 1972).

But if the issue is to be examined, it should be observed that it is confined to that part of the order which requires that the employees be made whole for the injury caused by the wrong they suffered. The Company's self-interest is not objectionably disadvantaged by the requirement that it observe the *in futuro* provisions of the order or that it reinstates the employees illegally ousted from their jobs. The specific question then is whether the employees should be denied back pay relief.

Whether or not retrospective relief is appropriate to vindicate a newly-enunciated principle requires a balance of the interests of the wronged and the wrongdoer in the light of the basic determinant of furthering the statutory purpose (*S.E.C.* v. *Chenery Corp.,* 332 U.S. 194, 203 (1947)):

> That such action might have a retroactive effect . . . [is] not necessarily fatal to its validity. Every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency. But such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory

design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.

In this case there would be no foundation for a claim that basic fairness is affronted by requiring the Company to make the employees whole. *First,* the standard adopted in this case is new only in the sense that before now no case which reached the Board squarely presented the question whether an employer is empowered to discharge an employee, and suspend or discharge her fellow-employees, for no cause other than insistence on union representation at an investigatory interview in which the risk of discipline reasonably inhered. As we have shown (*supra,* pp. 2-4), a perceptive reading of "case law" would not warrant a prudent judgment that the Company was pursuing a risk-free course. The Company therefore could not claim unfair surprise when it tripped along the chancy route it was running. *Second,* given the most wooden reading of Board precedent, it would be obvious that the Company was courting serious trouble on settled grounds. At the very least, the Company would be subject to the plain claim that it was conducting a disciplinary rather than an investigatory interview; that it was therefore duty-bound to grant union representation at the interview; and that suspending and discharging employees for asserting their right to union representation at a disciplinary interview is a garden-variety unfair labor practice. Indeed, in this case, the Trial Examiner "expressly" found that "such meeting did not seek information and was not investigatory in nature" (P. 38a), but that its purpose was disciplinary (*ibid.,* P. 45a), and on that basis he held that the discharges and

suspensions were unlawful. *Third,* quite aside from statutory protection, the collective bargaining agreement provided that "No worker shall be discharged or otherwise disciplined without good and sufficient cause" (A. 189); that "if the discharge or disciplinary act is found to be unjustified, the worker shall be reinstated and shall be compensated for the loss of his earnings during the period of such discharge or disciplinary act" (*ibid.*); and that a claim of violation of the contractual right was subject to determination through the grievance and arbitration procedure established by the agreement (A. 195-196). In this case the Union grieved the suspensions and discharges and invoked arbitration to resolve the claim (*supra,* p. 13, n. 6), a riposte so obvious that no employer could fail to realize its inevitability. In short, the Company was playing with too many fires to be able to complain that it did not foresee the particular one which burned it.

The Company's interest is therefore very shadowy. It brings a slight counter to weigh in the remedial balance. The employees' interest, on the other hand, is very heavy. They are the victims of the wrong. The only way to restore the *status quo ante* is to compensate them for their loss of earnings. Anything less leaves them without effective redress. The Board's remedies are notoriously weak at best.[12] To deny back pay would

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[12] Fanning, *New and Novel Remedies for Unfair Labor Practices,* 69 LRR 282 (1968); Brown, *Exploring the World of Remedies,* Labor Relations Yearbook-1967, 251; Fanning, *The Taft-Hartley Act-Twenty Years After,* Labor Relations Yearbook-1967, 209, 220; McCulloch, *An Evaluation of the Remedies Available to the National Labor Relations Board-Is There Need for Legislative or Administrative Change?,* 56 LRRM 125 (1964); McCulloch, *The Development of Administrative Remedies,* Address before the Midwest Seminar on NLRB Policy Changes, University of Chicago,

be to withhold the only redress which has any bite. Compensatory and deterrent objects of remedial relief would both be defeated.

The balance of interests thus clearly favors the employees. "... [T]he importance of protecting the statutory rights of ... [the] employees outweighs the fact that the company may have relied on a prior Board rule or policy. ... 'Unless the disadvantaged ... [employees] are compensated, they will have been penalized for exercising statutorily protected rights and the effect of discouraging future such exercises will not be completely dissipated. In these circumstances, it was not arbitrary or capricious for the Board to conclude that complete vindication of employee rights should take precedence over the employer's reliance on prior Board law.' " *Laidlaw Corp.* v. *N.L.R.B.*, 414 F.2d 99, 107 (C.A. 7, 1969).

In sum, given that the " 'relation of remedy to policy is peculiarly a matter for administrative competence' ", and that an order of the Board "will not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act' ", the back pay remedy in this case easily passes muster. *Fibreboard Paper Products Corp.* v. *N.L.R.B.* 379 U.S. 203, 216 (1964). And it surely does not lie in the mouth of

February 2, 1963; Ross, The Labor Law In Action-An Analysis of the Administrative Process under the Taft-Hartley Act (1966); Administration of the Labor-Management Relations Act by the NLRB, Report of the Subcommittee on the National Labor Relations Board, House Committee on Education and Labor, 2 (1961).

an *amicus* to say otherwise when the Company itself does not object.

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November, 1974

MOTION FILED
SEP 16 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1363

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

J. WEINGARTEN, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 73-765

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, UPPER SOUTH DEPARTMENT, AFL-CIO,
Petitioner,

vs.

QUALITY MANUFACTURING COMPANY AND NATIONAL LABOR RELATIONS BOARD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

The Chamber of Commerce of the United States of America respectfully moves, pursuant to Rule 42 of the Rules of this Court for leave to file the attached brief *amicus curiae* in support of the Employer, Quality Manufacturing Company.

This motion is directed only to the *Quality* case. With respect to the case to be heard in tandem with *Quality, National Labor Relations Board* v. *J. Weingarten, Inc.*, both the Solicitor (the Petitioner) and the Employer have consented to the Chamber's participation therein. In the *Quality* case, the Chamber has received the Employer's consent to participate.

Inasmuch as *Weingarten* and *Quality* present a common question, the accompanying brief is directed not only to the *Weingarten* case, pursuant to the received consents, but also is filed in the *Quality* case, contingent upon this Court's granting the Chamber's motion to participate in that proceeding.

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over thirty-seven hundred (3700) state and local chambers of commerce and professional and trade associations, a direct business membership in excess of thirty-eight thousand (38,000), and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

In order to represent its members' view on questions of importance to their vital interests and to render such assistance as it can to courts' deliberations in such areas, the Chamber has frequently participated as *amicus curiae* in a wide range of significant labor relations matters before this Court and Courts of Appeals.*

The instant proceeding, just as the companion *Weingarten* case, is of particular concern to the Chamber's members, as well as to employers generally, since it involves a question of theoretical significance in the administration of the National Labor Relations Act which also has enormous practical importance in employers' ability to manage their businesses efficiently. The rule of law which the Board has applied in this case reflects a view of the content and limits of Section 7 of the Labor Act which is both unprecedented and which constitutes an impingement upon what has been considered a legitimate exercise of management prerogatives. Thus, in determining the extent to which employees may insist upon union representation during private interviews with management, this Court will determine not only the validity of a rule, but the validity of the Board's approach to the interpretation of Section 7. Similarly, the resolution of this question will govern, in an important respect, management's ability to secure the information from its employees which it requires effectively to manage its business. Unlike some other questions of comparable theoretical interest, the issue posed here is one which confronts all employers, regardless of their size or the nature of their businesses, and arises with frequency in the regular course of their managerial responsibilities.

* *E.g., N.L.R.B.* v. *Textron, Inc.*, ... U.S. ...., 85 LRRM 2945 (1974); *Geduldig* v. *Aiello, et al.*, ... U.S. ...., 8 F.E.P. Cases 97 (1974); *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971); *N.L.R.B.* v. *Granite State Joint Board*, 409 U.S. 213, 34 L. Ed. 2d 422 (1972); *Boy's Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970); *H. K. Porter Co.* v. *N.L.R.B.* 397 U.S. 99 (1970); *Sears Roebuck and Co.* v. *Carpet Layers, Local 419*, 397 U.S. 655 (1970); *Super Tire Engineering Co., et al.* v. *McCorkle, et al.*, ... U.S. ...., 85 LRRM 2913 (April, 1974); *N.L.R.B.* v. *Mobil Oil Corp.*, 482 F. 2d 842 (1973); *N.L.R.B.* v. *Frank Visceglia and Vincent Visceglia t/a Peddie Buildings*, ... F. 2d ...., 86 LRRM 2541 (CA 3, 1974); *Scott Hudgens* v. *N.L.R.B.*, No. 73-3264 (CA 5, 1973).

Accordingly, the practical significance of the issue presented here, together with the implications of the Board's interpretation of the statute and the resulting problems which are created in the administration of the Act, impels the Chamber to submit its views for the consideration of this Court.

Inasmuch as the Chamber is filing in support of the Respondent, *Quality*, it does not appear that the Petitioner has been prejudiced by the Chamber's submission of its brief at this time. Indeed, as stated, the Solicitor, the Petitioner in the companion *Weingarten* case, similarly circumstanced with the Petitioner in *Quality*, has expressly given such consent.

WHEREFORE, the Chamber respectfully urges the Court to grant this Motion for leave to file the accompanying *amicus curiae* brief.

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE.

INTEREST OF THE AMICUS CURIAE.

The interest of the Chamber is set out in the foregoing Motion for leave to file this *amicus curiae* brief.

SUMMARY OF THE ARGUMENT.

These cases present the common issue of whether the National Labor Relations Act requires an employer to permit an employee to have union representation at a fact finding investigatory interview if the employee has reasonable grounds to believe that disciplinary action might result from the employer's investigation. The courts below,[1] reversing holdings by the Labor Board, answered the presented question in the negative. The Chamber contends that the decisions of the courts below should be affirmed by this Court inasmuch as the rule promulgated by the Board's decisions below is illogical, unworkable, and inconsistent with congressional intent and the design and objectives of the Labor Act.

This Court's rationale in *N.L.R.B.* v. *Textron, Inc.*, ____ U.S. ____, 85 LRRM 2945 (1974) endorses the Chamber's position. There, this Court held that the Labor Board cannot summarily overturn years of uniform statutory construction, and contrary to congressional intent, read a more restrictive meaning into the Act. Contrary to *Textron's* reasoning, the Board in its *Quality* decision below enunciated a rule governing employees' entitlement to union representation during interviews

1. *N.L.R.B.* v. *Quality Manufacturing Company*, 481 F. 2d 1018 (CA 4, 1973), denying enforcement of 195 NLRB 197; *N.L.R.B.* v. *J. Weingarten, Inc.*, 485 F. 2d 1135 (CA 5, 1973), denying enforcement of 202 NLRB No. 69.

with management which reversed established precedent, contravened congressional intent and the scheme of the Act and imposed new restrictions upon employers. Thus, until its decision in *Quality* below, the Board with court approval had consistently held that the statutory rights of employees did not include the right of union representation in pre-disciplinary investigatory interviews with management. In addition to overturning years of uniform statutory construction, the Board's new rule imposes new and rigorous restrictions upon employers as they attempt to elicit information necessary to maintain efficient operations. The presence of union representatives in fact-finding interviews will frustrate and may well foreclose the flow of information that is required by employers if they are to make reasonable decisions with respect, *inter alia*, to plant security, employee discipline, and work flow.

It is apparent that the Board's long-standing rule concerning the right to representation during investigatory interviews, rather than the rule it enunciated in *Quality* and followed in *Weingarten*, is consonant with the statute's design and with congressional purpose. The former rule had existed since at least 1947. Had Congress believed that the Board's construction of the Act constituted a misconception of congressional intent, it could have effected a correction either in the subsequent Taft-Hartley Amendments or in the Amendments of 1959. Furthermore, the new rule has manifold internal infirmities, which make it unworkable and consequently an unreliable guide to conduct as employers embark upon their many and varied interviews with their employees. It should not be presumed that a rule whose application is fraught with uncertainty is a manifestation of Congress's intent absent legislative expression endorsing such a result. Such a pronouncement is, of course, not here present.

It follows from the foregoing that the Board's new rule must be rejected pursuant to this Court's reasoning in the analogous *Textron* case. The Board below has attempted to accomplish what this Court has proscribed in *Textron*: it has promulgated

a rule which overturned a history of uniform statutory construction, infused new restrictions upon employers as they engage in daily, normal business operations and acted in a manner not contemplated by Congress and contrary to the design of the Act.

Independently, the novel construction of the Act forged by the Board below must be repudiated since it does not involve concerted activity which is recognized and protected by the Act. That is, an employee's request for representation at an investigatory interview involves merely an attempt to secure his personal interest and therefore does not constitute concerted and protected action. Thus, it has been judicially recognized that in order to prove activity is concerted under Section 7, it is necessary to demonstrate that the activity was for the purpose of preparing for group action to correct a grievance or a complaint. During a pre-disciplinary fact finding interview, no management decision affecting an employee's working conditions has transpired, and therefore there has been no determination that could serve as the basis for a grievance. It follows that a request for representation during an investigatory interview is not made to prepare for group action to correct a grievance or complaint. Consequently, such a request is not activity that is recognized to be concerted and protected by the Act.

Furthermore, since under established Board precedents a union has no right to demand that it be present at such interviews, the nature of the interests to be protected at the interview cannot be considered to be collective or concerted. Otherwise, since a union is charged to protect collective interests, an employer would be statutorily compelled to permit its presence.

It is evident from the foregoing that the objectives of the Act will not be served by recognizing the validity of the Board's new rule, and, accordingly, this Court is urged to repudiate it and affirm the decisions of the courts below.

ARGUMENT.

THE BOARD'S RECENTLY ADOPTED RULE ENTITLING EMPLOYEES TO UNION REPRESENTATION DURING INVESTIGATORY INTERVIEWS WITH MANAGEMENT PERSONNEL IS CONTRARY TO THE DESIGN AND OBJECTIVES OF THE ACT.

A. The Board's New Rule Reverses Twenty-five Years of Uniform Precedent and Contravenes Both Congressional Intent and the Rationale of This Court's Textron Decision.

This Court in its *Textron*[2] decision has held explicitly, and the Chamber is contending, that the National Labor Relations Board cannot summarily reverse years of uniform statutory construction and, contrary to Congressional intent, read a new and more restrictive meaning into the Act.

It follows from the rationale underpinning *Textron* that the Board has no warrant to hold, as it did below, that an employer must permit an employee to have union representation during a fact finding, predisciplinary interview whenever the employee thinks he has reasonable ground to fear that disciplinary action may result from the employer's investigation. The holdings by the Board below, analogous to the Board's *Textron* decision, represent a dramatic reversal of years of consistent statutory construction, severely restrict an employer's ability to secure information necessary to conduct his business and contravene Congressional intent.[3]

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2. *N.L.R.B.* v. *Textron, Inc., supra.*

3. As the court below in *Quality* aptly and correctly observed, "never has it been thought, as the Board would hold here [in Quality], that [an employee's statutory rights] require an employer to permit an employee to have a union representative present whenever the employee 'has reasonable ground to fear that the interview will adversely affect his continued employment, or even his working conditions'." 481 F. 2d 1018, at 1024.

From at least the time the Seventh Circuit decided *N. L. R. B.* v. *Ross Gear and Tool Co.*,[4] in January, 1947, until the Board's decision in *Quality* below in January, 1972, the Board had adhered to the proposition that employees were not statutorily entitled to the presence of their union representatives at management interviews held to gather information or investigate facts; employers were held neither to violate Section 8(a)(1) nor 8(a)(5) by refusing to permit the union to be present until after some decision was made which could become subject to the parties' grievance and arbitration machinery.

Thus, in an administrative decision of the General Counsel's office in 1962,[5] the General Counsel refused to issue a Complaint in a situation where an employer prevented a union steward from attending an interview whose purpose was to verify an employee's excuse for his absence from work. According to the General Counsel, the statute created no duty on the employer to permit union attendance at employee interviews until the employer's investigation was completed. While this decision did not come before the Board since no violation of law was found warranting further proceedings, the Board did have an opportunity to confront the issue shortly thereafter in *Chevron Oil Co.*[6] For purposes of the instant proceedings, *Chevron Oil* was a particularly instructive case since the General Counsel had apparently altered his view of the law as expressed in the 1962 administrative decision, and urged upon the Board the contention that an employer violates Section 8(a)(1) of the Act by depriving an employee of union representation at a management interview when there exists a *possibility* of discipline resulting therefrom. The Board rejected the General Counsel's arguments and restated its conviction that the Act conferred no such asserted right during the performance of management's investigatory role. Not only did the Board precisely reject the

4. 158 F. 2d 607 (CA 7, 1947).
5. SR-2382, CCH NLRB Paragraph 11,991 (1962).
6. 168 NLRB 574 (1967).

position there which it now asserts in the cases below, but it did so specifically in the context of an 8(a)(1) charge.

In the instant proceedings the Board, in its brief in *Weingarten* pages 24-26, seeks to distinguish its former contrary decisions, such as *Chevron Oil*, by urging that it merely affirmed decisions of law judges without any "considered analysis" and by asserting that the prior decisions involved the question of unions' rights to be present at employee interviews pursuant to the bargaining rights conferred in Section 8(a)(5), rather than, as here, employees' right to representation as conferred in Section 7 and violated in Section 8(a)(1). The Board's attempt to justify its new rule by "confessing" that for over 25 years it merely rubber-stamped law judges' decisions without analysis is startling on its face. The Board is charged with deciding unfair labor practice controversies arising under the Act. (Section 10(c)). Accordingly, it is presumed that the Board obeys its congressional mandate. Therefore, a summary affirmance of a law judge's decision must necessarily constitute complete agreement with that decision and *its rationale*. If the Board at its whim may deny the precedential value of any decision where it has affirmed a judge's findings without significant comment, a wholesale reevaluation of what may constitute Board precedent will be necessary. This will result in chaos for those involved in the labor-management field and produce a justifiable erosion of public confidence in administrative tribunals. The Board's explanation therefore must fall because it is foreign to our administrative system and to sound labor policy.

In the *Weingarten* case then, the Board's effort to mask the inconsistency of its current position is unavailing. Indeed, the majority of the present Board ignored the teaching of its predecessor which, in *Chevron Oil*, adopted the following conclusion and rationale of the Law Judge:

> "To be sure, *Section 7* of the Act guarantees to employees the right to be represented by their collective bar-

> gaining representative in all areas pertaining to their terms and conditions of employment, and the penalty of suspension from work for alleged insubordination most assuredly is encompassed within those terms and conditions. . . . But this is not to say that a bargaining agent must be privy to management councils, or that represented employees must be shielded by that agent from company inquiries, on each and every occasion when management embarks upon an investigation to ascertain whether plant discipline has been breached. . . . I fail to perceive how the exclusion of Union Steward Kosmyna from those meetings intruded upon the *rights of employees* or affected the Union's representative status . . . [or how] Respondent evaded *any* statutory obligation by refusing to entertain the presence of a union representative during the discussion of an alleged rule infraction when no definite adverse action has as yet been decided upon by Respondent."[7] (Emphasis added).

In an unbroken line of cases, the Board has adhered to the holding and rationale of *Chevron Oil*. The resulting rule was adopted and followed in *Jacobe Pearson Ford, Inc.*,[8] *Dayton Typographic Service*,[9] *Wald Manufacturing Company*,[10] *Texaco, Inc. Los Angeles Sales Terminal*,[11] *Illinois Bell Telephone*,[12] and *LaFayette Radio Electronics*.[13] In all of these cases the Board rejected claims that *employees* had a statutory entitlement to the presence of union representation during investigatory interviews with management.

In an instance in which the Board held the presence of such representation to be proper, the predicate for that result was the Board's conclusion that the purpose of the interview was not investigatory, but was rather to develop evidence, *following*

7. 168 NLRB at 578.
8. 172 NLRB No. 84 (1968).
9. 176 NLRB 357 (1969).
10. 176 NLRB 839 (1969), aff'd 426 F. 2d 1328 (CA 6 1970).
11. 179 NLRB 976 (1969).
12. 192 NLRB No. 138, 78 LRRM 1109 (1971).
13. 194 NLRB No. 77, 78 LRRM 1693 (1971).

a decision to impose discipline, to support the previously reached determination.[14]

Each of the cases decided after *Chevron Oil* cited that case as governing authority. Each of them, therefore, may be considered to have adopted *Chevron's* determination that *neither* Section 7 nor Section 8(a)(5) constituted statutory warrant for the union's presence during pre-discipline interviews; nothing stated by the Board in any of them suggested any disposition to reach any other conclusion with respect to either the Section 7 or Section 8(a)(5) aspects of the *Chevron* decision.

A particularly instructive case is *LaFayette Radio Electronics, supra*. This case was decided only six weeks before the Board determined, in *Quality*, to overturn the accepted and long-established rule which was created by the decisions in the series of cases discussed above. In *LaFayette*, the Board adopted the Law Judge's summary of the law as it had been forged during at least the previous twenty-five years:

> ". . . the principle appears to have evolved that the right to union representation exists if the purpose of the meeting between the employee and management is disciplinary; but that the union has no right to be present if the purpose of the meeting is fact finding or investigatory."[15]

It should be noted that the principle thus articulated is framed in terms of the *employee's* "right to union representation" and hence involves an interpretation of the content of Section 7 of the Act; it does not represent, as the Board's attempted distinction between its new and former rule would have it, a focus only

14. *Texaco, Inc., Houston Producing Div.*, 168 NLRB 361 (1967), enf. den. 408 F. 2d 142 (CA 5, 1969), on the ground that employees' right to union representation does not extend to all dealings with the employer which may ultimately affect employment conditions.

15. 194 NLRB 491, 492. It is evident that the Judge considered the principle involved to be based upon Board precedent even though the Board may simply may affirmed previous Law Judges' decisions.

on the *union's* role as bargaining agent under Section 8(a)(5). Similarly of significance in *LaFayette* is the fact that the General Counsel had sought from the Board a ruling granting employees the right to union representation at all interviews with management, whether investigatory or not, from which a decision to effect any discipline might emerge. This effort, which appeared to seek a rule analogous to that of this Court's right-to-counsel rule in *Escobedo* v. *State of Illinois*,[16] was firmly rejected by the Board in favor of the above-quoted then existing and established legal standard.

The foregoing discussion of the evolution of the Board's rules gives rise to two conclusions. First, the Board's former rule concerning employees' right to union representation during investigatory interviews stems at least from the time the Seventh Circuit decided *Ross-Gear & Tool Co.* in early 1947. That decision predated the Taft-Hartley amendments to the Labor Act. Had Congress believed that rule to constitute a misconception of its statutory design, it could have effected a correction either in the subsequent Taft-Hartley amendments or in the amendments of 1959 or at any other time. On the contrary, despite so long a history of uniform application of that rule there is no evidence of Congressional displeasure with it. It would appear fair to conclude, therefore, that the rule fairly expressed Congress' intent.[17]

Second, where an administrative rule of law has become accepted and established over a long period of time, without objection from the legislature body whose enactment gave rise to it, the courts should be reluctant to accept a reversal of that rule in the absence of a change in the statute. The justification of such a reversal should constitute a heavy burden for the administrative body which seeks to impose it. In the instant cases, the Board has offered no explanation for its action. As the court below in *Quality* observed, the Board has failed to articulate reasons for reversing years of uniform statutory interpretation.

16. 378 U. S. 478.

17. In addition, part B advances arguments that demonstrate that the *new* rule is contrary to congressional intent.

If the Board is to enlist judicial approval of its new interpretation of the Act, it must demonstrate by compeling argument that its novel construction is an accurate reflection of Congressional design. The Board's failure to advance such arguments requires the rejection of its new interpretation of the Act.

Furthermore, as demonstrated above, the Board's effort to distinguish between Section 7 and Section 8(a)(5) rights in order to avoid the appearance of conflict is not supported by its own prior decisions. Nor is it rational to accept such a distinction-after-the-fact. If all those employees who were held unentitled to union representation over the past years could have achieved a different legal result merely by arguing their cases differently or relying on a different Section of the same statute, then surely that point would have been made by the Board in some manner in at least one of its prior decisions. That no such observation was made is ample proof that in the instant case the Board is indeed advancing a new and inconsistent interpretation of the statute.

It cannot be doubted that this novel interpretation of the Act will significantly restrict employers in their efforts to ascertain facts necessary to make required management decisions with respect, *inter alia*, to plant security and work rules. As will be discussed in more detail in part D *infra*, the presence of union officials at fact finding interviews will frustrate, if not entirely foreclose, the flow of information that management needs to efficiently operate its business. Thus, similar to its attempt in *Textron*, the Board below has imposed new restrictions upon employers, contrary to congressional intent. In *Textron* the Board had determined that all managerial employees are covered by the Labor Act, except those whose participation in a union would create a conflict of interest with their job responsibilities. This Court, rejecting the Board's holding, reasoned that it conflicted with long-standing Board precedent which had excluded all managerial employees from the Act's coverage. This Court further recognized that the Board's decision diminished management's necessary control over those persons who formulated his policy and clearly contravened

congressional intent. Thus, the effect of the Board's rule below is similar to the result that the Board sought to accomplish in *Textron*. Both below and in *Textron* the Board overturned long-standing precedent, infused new restrictions upon employers as they operated their businesses and contravened congressional intent and the Act's design.

In view of the rationale underlying *Textron* and the arguments urged above and hereinafter, the Board's novel construction of the Act must be rejected.

B. The New Rule Is Illogical and Unworkable.

A fundamental premise of sound legislative construction is that Congress should not be presumed to have intended, or subsequently to approve, a statutory interpretation which is logically and philosophically unsound.[18] The subject rule, as an interpretation by the Board of the latitude of Sections 7 and 8(a)(1) of the Act, is the product of such an interpretation.

This rule,—which provides that an employee who is called in for *any* interview or discussion by management and who requests union representation may not lawfully be denied such representation so long as the employee has reasonable grounds to fear the interview *may* adversely affect his working conditions,—contains serious infirmities.

Initially, a finding that the employer, by denying such a request, has violated the law is a function of what the employee says and what the employee may suspect. Thus, curiously, the employer's violation of law may have nothing whatever to do with what *he* does or believes or intends, with whether his object is anti-union or wholly altruistic. Since what an employee believes to be the employer's intention or desire may bear no relationship to fact,—as, for example, when the employee hears plant rumors which are both untrue and unknown to the employer, a violation of this rule by an employer may

18. *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381.

result from an incorrect belief by the employee in the presence of non-existent intentions all unknown to and unknowable by the violating employer.[19]

Just as this rule focuses on the conduct and attitudes of the wrong persons, it also emphasizes the importance of the wrong variables. For the portion of the rule which makes reference to an employee's "reasonable grounds" to fear an adverse consequence of an interview with management presents its own serious problems. What is objectively "reasonable" has no necessary relationship to reality. The need to determine in every instance of the application of this rule whether a given employee reacted with objective reasonableness to the totality of circumstances surrounding his situation will inevitably involve inquiry into the private and hence subjective views of each employee. What is "reasonable" to any given individual depends not only on his knowledge and assessment of external circumstances, but also on his knowledge of his personal situation and the relationship of the one to the other. Thus, for example, whether an employee has a reasonable basis to fear discipline as a result of interviews concerning damage to company property must depend both upon the employee's awareness of the existence of damage and of his own responsibility or participation. Neither the employer nor the Board can really be sure of the employee's basis for reasonable fear in the absence of his confession of guilt. On what basis, therefore, is the employer to judge whether he must, under the rule, permit union representation? If the mere fact that an interview is to be conducted on a matter warranting discipline is sufficient to cause reasonable fear on the part of anyone interviewed, then the rule's focus

19. Of course, the employer may obviate his own difficulties with this rule by ceasing to hold any employee interviews at all or by permitting the union to be present at all times, thus forsaking either the benefits to be derived from such meetings or an important aspect of management's right effectively and, where necessary, confidentially to run its own administrative affairs in a non-discriminatory manner. A purpose to compel such a choice should not easily be attributed to Congress.

on the concept of reasonable fear is a superfluity; the rule, in that case, should merely require union representation at all interviews. The Board does not go that far, of course, and thus creates an impossible dilemma: the mere fact of the interview alone does not give rise to an objective and reasonable fear of adverse consequences, and the extent to which the employee has a genuine basis for fear, through discovery of his own culpability, cannot be known by the employer prior to the interview. However, it is frequently at that time that he must make his decision whether to allow union representation. Thus, at least as a general proposition, the rule cannot be rationally applied on its own terms.

Indeed, the difficulty in applying it under any circumstances can be demonstrated from an example cited by the Board itself, in its *Quality* decision below, as an illustration of a clear case when an employee would have no basis for seeking union representation. The Board majority suggests that an interview for the purpose of giving an employee "needed corrections of work techniques" would not tend to produce a reasonable fear of adverse consequences and the Board would not, therefore, require an employer to permit union representation. However, there are several problems inherent in this illustration. First, the Board's rule does not appear to require the employer to disclose the precise purpose of the interview in advance, so that an employee called to an interview may have no basis for knowing how "fearful" he should be of its consequences. May he compel the employer to state the exact purpose of a requested interview before he agrees to attend? Should he with impunity be allowed to refuse to attend without such disclosure by his employer? If an employee has committed a serious infraction of the plant's work rules and is called by management to an interview whose purpose is not stated to him but, in fact, involves another matter offering no jeopardy whatever, what are his rights? On any objective standard, the employee has reason to fear the consequences of the interview whereas the employer,

having read the Board's *Quality* decision, knows that the Board believes there to be "no reasonable basis for [the employee] to seek the assistance of his representative" in the interview which the employer wishes to conduct. And, finally, it is submitted that reasonable men can differ even with respect to the substance of the illustration the Board majority cites as being clear. For it appears to the *amicus curiae* that even were an employee to be informed prior to a requested interview that its purpose was to correct his work techniques, he might well have justifiable fear that the poor work performance which gave rise to the need for the interview might also result in a transfer to another job or another shift or to a probationary status pending improvement in his performance. A poor worker interviewed about his poor work techniques may thus have a more substantial basis for a reasonable fear of adverse consequences than another employee who is interviewed about a theft he did not commit, yet the Board would presumably require the requested presence of union representation only in the latter situation.

The Board's decision in *Mobil Oil Corp.*, 196 NLRB No. 144 (1972), enforcement denied 482 F. 2d 842 (CA 7, 1973), raising the same issue as is presented here, illuminates the weaknesses in its new rule. In that case employees Burnett, Smith, Mathews and Hill were interviewed by the same management personnel, for the same purpose, in the same manner and received the same discipline for the same offense. Yet the discharges of the first two were deemed unlawful because they sought representation prior to or during their interviews, while the discharges of the remaining two were considered proper because they made no such request. However, the only employee of the four who was willing to sign a statement was Smith who asserted his innocence throughout. He, presumably, had no basis for fear or appeared to have none insofar as such conduct evidences his state of mind. Yet his discharge was unlawful. Employee Mathews, who refused to sign any such state-

ment but failed to seek the union's presence was considered permissibly discharged, although his conduct would appear to suggest a more substantial basis for fear of discipline by management. The implication of the Board's decision in that case is that establishment of the existence of the required reasonable fear of adverse consequences may reduce simply to whether the employee seeks the union's presence and assistance. The disposition of Smith's case suggests that conclusion. This may well be the only rational way to apply the rule, but it is nonetheless a distortion of the terms of the rule itself. A rule of law whose sensible enforcement involves ignoring some of its own requirements should not be construed to comport with Congress' intent or design.

C. An Employee's Request for Representation at Investigatory Interviews Involves a Personal Interest and Not Protected, Concerted Action.

The National Labor Relations Act protects employees' *concerted* activity. An employee acting for himself and who pursues interests which are personal and not shared by his fellow members of the bargaining unit does not, therefore, engage in conduct which the Act was designed to protect. It is submitted that a request for union representation at an investigatory interview seeks personal protection unallied to a protected group or collective interest.

The body of law traced in the preceding sections of this brief established, at a minimum, that a union as a functioning entity has no right to demand to be present at investigatory interviews of its members; that is, an employer would not violate Section 8(a)(5) of the Act by rejecting the union's demand.[20] Since unions are charged with the duty of representing their members

20. The Board has not quarrelled with this conclusion. Rather, the Board adopts it, arguing that the representational claim involved here stems from employees' rights under Section 7 and not from unions' rights under Section 8(a)(5).

in matters in their collective interest, it appears to follow that in the described line of cases the Board has already determined that union representation at investigatory interviews is not required by any such collective interest; otherwise employers surely would be compelled to permit the union's presence.

In order to justify its findings below, the Board asks this Court to adopt a conceptually untenable position: an employee would be held to have a right to union representation under the language of Section 7, which guarantees him the right to engage in "*concerted* activities for the purposes of *collective* bargaining or other mutual aid or protection", while the union's statutory inability to insist on being present negates the existence of a collective bargaining purpose or concerted activity or any employee effort to secure mutual aid. The Board cannot have it both ways. If the interests or potential jeopardy of an employee at an investigatory interview do not rise to the level which would permit his union representatives to involve themselves in his protection, then, as a matter of logic and statutory design, the employee himself cannot compel the union's representation to protect the very same interests. The extent of the interests to be protected, the need for protection and the nature of the services which the union can provide its members is the same whether the performance of those services is sought to be invoked by the union itself or by an employee whom it represents.

It follows, therefore, that the described representation sought by an employee must constitute an effort to secure an individual or personal employment right which unions do not protect, rather than a concerted one which they do protect. Whatever may be the merit or wisdom in an eventual statutory recognition of such rights in employment situations, it is clear that the Act currently neither recognizes nor protects such alleged rights. Unless Congress moves to confer them by amendment, the Act may not be interpreted to cover them.

Accordingly, during investigatory interviews with management,—a period prior to the engagement of the union's au-

thority to act on behalf of a member's interests,—requests for representation involve unconcerted individual conduct, unprotected by the Act. *Mobil Oil Corporation* v. *N.L.R.B.*, 482 F. 2d 842 (CA 7, 1973); *N.L.R.B.* v. *J. Weingarten, Inc., supra.*

Furthermore, as the Seventh Circuit held, in order to prove concerted activity under Section 7, "it is necessary to demonstrate [at least] that the activity was for the purpose of inducing or preparing for group action to correct a grievance or a complaint. *Indiana Gear Works* v. *N.L.R.B.*, 371 F. 2d 273, 276 (1967). This decision is consonant with the earlier decision in that circuit, *N.L.R.B.* v. *Ross Gear & Tool Co.*, 158 F. 2d 607 (1947). *Ross* held that there is no statutory right to representation at interviews not involving the presentation of a grievance. The Board's decisions in these causes below are clearly inconsistent with *Indiana Gear* and with *Ross*. That is, during a fact finding interview no management decision affecting an employee's working conditions has been made, and therefore there has been no decision that could serve as the basis of a grievance. It follows that a request for representation during an investigatory interview cannot have been made to prepare for group action to *correct* a grievance; the request is accordingly not "concerted activity" as that term has been traditionally used when speaking of employee rights under the Act.[21]

21. The Petitioner's reliance on *N.L.R.B.* v. *Washington Aluminium* (370 U.S. 9 (1962)) is wholly misplaced. There, the activity—walking off the job—was traditional concerted activity *initially* and, therefore, entitled to the Act's protection. Here, in contrast, the request for representation during investigatory interviews does not involve concerted conduct, and accordingly, cannot be protected by the Act.

Thus, as demonstrated in detail above, an employee's request for representation during an investigatory interview is not designed to prepare for group action to correct a grievance, since no management decision to discipline the employee has been made. Furthermore, since under Board law a union has no right to demand that it be present at a fact finding interview, the nature of the interests to be protected and the need for protection at such an interview is not collective or concerted. Otherwise, since a union is charged with protecting these interests, an employer would be compelled by the Act to permit its presence. For these reasons, the request for representation necessarily involves only non-concerted, unprotected conduct and *Washington Aluminium* is therefore inapposite.

Washington Aluminium is not applicable for another and independent reason. In that case there were at issue two separate and distinct duties to the involved employees: a duty to bargain with those employees; a duty not to discipline them. Each of these duties existed independently from the other and each was enforced by a specific section of the Act. Consequently, an employer might breach one of these independent duties but not the other, as in fact occurred in *Washington Aluminium*, and thus violate one statutory provision but not the other.

Here, in contrast, there is at issue only a single duty: whether an employer has a duty to employees to permit them to have union representation during investigatory interviews with management. Whatever the ultimate resolution of the issue in this case, *Washington Aluminium* is not authority for the Petitioner's contentions.

D. The Board's Newly Adopted Rule Converts a Non-Mandatory Subject of Bargaining Into an Unfair Labor Practice and, Independently, Is Contrary to Sound Policy and the Purposes of the Act.

A principal policy objective of the National Labor Relations Act is to effect a balance between employees' right to act in concert for their mutual protection and employers' right to operate and manage their businesses effectively and without interference.[22] The challenged rule of law which the Board has applied to these cases creates an unnecessary and harmful imbalance between these competing rights because it interferes with employers' ability to secure needed information while according to employees rights which are not required for the furtherance and protection of their legitimate interests.

22. *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S. 235 (1970); *Central Hardware Co.* v. *N. L. R. B.*, 407 U. S. 539 (1972). See also *Allied Chemical & Alkali Workers of America* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157 (1971), in which this Court stated that managerial judgments which threaten employees' jobs are not necessarily subject to bargaining: "Other considerations, *such as the effect on the employer's freedom to do business*, may be equally important." 30 L. Ed. 2d at 358, n. 19. (Emphasis added.)

The effective, efficient management of a business will frequently require a company to engage in investigatory interviews. Management's opportunity to make reasonable and appropriate decisions with respect to numerous areas of its legitimate concern, whether plant security, formulation and adherence to rules and employee discipline, or problems of work flow, are subject to its right to secure reliable information from employees. Were the availability of that information to be curtailed, a company's ability intelligently to make such decisions would severely be inhibited. Yet the presence of union agents at every investigatory interview from which any employee, however mistakenly, feared some adverse consequence would inevitably result in such a curtailment of information. For the union agent's representation of an employee would likely take the form of a prohibition on giving any information at all; this would be the clearest means for assuring that nothing would be said or revealed of possible harm. Whether the union representative would recommend a total or only partial refusal to cooperate is immaterial. The effect of either course would tend to deprive management of essential data unavailable from any alternative source. Similarly, management frequently requires information from its employees promptly. If each request by management must be preceded by a series of negotiations with the employee and his union as to the nature of the interview, the areas of possible jeopardy and the employee's right to union representation, a form of industrial chaos is invited.

Whereas the consequence of according judicial approval to the rule urged by the Board would surely be to retard the flow of information needed by management to carry out its obligation to run its business efficiently, the protections which would thereby be accorded to employees exceed their reasonable requirements. Where contractual grievance and arbitration provisions exist, the substance of any adverse impact on employees resulting from investigatory interviews becomes subject to full review. It is true, of course, that an employee's right with impunity

to restrict management from obtaining information may result in management's inability to sustain the imposition of discipline and thus obviate employees' need to invoke the grievance-arbitration machinery. While this would likely be one effect of the judicial approval of the position urged by the Board below, not even the Board has contended that Section 7 of the Act should be read to insulate employees from the consequences either of their improper conduct or of any conduct unrelated to union or other statutorily protected activity. It is sufficient protection of an employee's legitimate interests to afford him recourse to his contractual remedies, as earnestly and actively pursued by his collective bargaining representatives.

Where no such contractual protections exist, the provisions of the National Labor Relations Act afford relief and redress from any improper management conduct in connection with investigatory interviews.[23] The Board has established a series of rules protecting employees from management interviews which trench on their statutory rights under Section 7. In addition to the familiar general prohibitions against threats and promises of benefit in connection with employees' collective preference and activity,[24] the Board, in a much litigated area of its jurisdiction, has adopted rules specifically governing the isolated questioning and interviewing of employees.[25] The Board has always

23. Such statutory guarantees also exist where employees are covered by the terms of a collective bargaining agreement. In those circumstances, the further protections contained in the Board's proposed rule are doubly unwarranted.

24. See, e.g., *N. L. R. B.* v. *Exchange Parts Co.*, 375 U. S. 405 (1964); *N. L. R. B.* v. *Neuhoff Bros.*, 376 F. 2d 372 (1967); *N. L. R. B.* v. *Power Equipment Co.*, 313 F. 2d 438 (CA 6, 1963); *General Industries Electronics Co.*, 146 NLRB 1139 (1964).

25. *Essex Wire Corp.*, 188 NLRB No. 59 (1971); *Heck's Inc.*, 172 NLRB No. 255 (1968); *Redcor Corp.*, 166 NLRB 1013 (1967); *Blade-Tribune Publishing Co.*, 161 NLRB 1512 (1966); *General Industries Elec. Co.*, 152 NLRB 1029 (1965); *Montgomery Ward & Co., Inc.*, 146 NLRB 76 (1964); *United Aircraft Corp.* v. *N. L. R. B.*, 440 F. 2d 85 (CA 2, 1971); *Bon-R Reproductions, Inc.* v. *N. L. R. B.*, 309 F. 2d 898 (CA 2, 1962).

focused strongly on the protection of employees' rights, as, for example, in rendering unlawful questioning which places an employee in the position of acting as an informer regarding the protected conduct of his fellow employees.[26]

The foregoing discussion leads to two independent conclusions. First, the Board's challenged rule in actuality properly constitutes a non-mandatory subject of bargaining under the rationale of this Court in *Pittsburgh Plate Glass Co., supra.* This Court there held that unless a subject will "settle an aspect of the relationship between the employer and the employees" and unless its impact on their working conditions is significant and not merely "speculative," the employer is under no duty to bargain and may act unilaterally with respect to that subject. In the instant case, for the reasons cited in *Ross Gear and Tool Co.* and its progeny, no employee interest or right warrants or permits a union's involvement until there exists some decision by management which could serve as the basis for a grievance. The Board itself has taken the view that unions have no role to play, pursuant to the bargaining rights granted them in Section 8(a)(5) of the Act, during investigatory interviews. It follows that if no union response is appropriate, or if such a response is premature, then there is not involved an issue which will "settle an aspect of the [parties'] relationship". When, in addition, there exists only a "speculative" need for the union's involvement, as during investigatory interviews where no decision has been made substantially affecting any employee's working conditions, then there is clearly satisfied the requirements for the existence of a non-mandatory bargaining subject. This is particularly true where, as here, there also exist important management interests requiring unilateral action. It is submitted that if the union's presence during purely investigatory interviews is not a mandatory subject of bargaining, then management's refusal to permit such a presence cannot constitute an unfair labor practice. Of course, the parties may choose to negotiate

26. *Abex Corp.*, 162 NLRB 328 (1966).

the subject, as in *Western Electric Co.*, 198 NLRB No. 82 (1972), and thus become bound to their contractual commitments. However, absent such a voluntary act, there exists no right whose denial gives rise to unlawful conduct.

Independently of the question whether a union's presence at purely investigatory interviews constitutes a non-mandatory bargaining subject, the same considerations urged on behalf of that result also support the conclusion that as a matter of sound policy the rule involved herein be rejected by this Court as effecting an unnecessary imbalance between management's legitimate interests and employees' legitimate needs.

Thus, available contractual and statutory remedies are more than adequate to protect employees from the invasion by employers of their legitimate interests during investigatory interviews. Since the information derived from such interviews is essential to employers' ability to manage, and since twenty-five years of experience demonstrates the sufficiency of the Board's former rule in safeguarding the interests of all parties, the Board's current effort to amend that rule should be judicially rejected.

In addition to causing an imbalance in the proper resolution of conflicting interests, the Board's newly adopted rule is inconsistent with Section 203(d) of the Labor Act and subsequent developments in Board law which implemented that Section.

Section 203(d), in pertinent part, provides as follows:

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

In the instant cases the parties have, through negotiation, agreed to final and binding arbitration to adjust disputes such as occurred in these cases. It would appear that adherence to the Congressional will codified in Section 203(d) would dictate that the Board leave to the parties' agreed contractual procedures the resolution of their respective rights in this area. The Board's

earlier decision in *Western Electric, supra,* indicated the Board's disposition to do so. The body of law which the Board has evolved as a consequence of its decision in *Collyer Insulated Wire,*[27] in which the Board announced its intention to defer to the parties' mutually chosen contractual remedies, constituted a similar instance in which the Board gave effect to the legislative mandate contained in Section 203(d). Therefore, application by the Board in these cases of its current interpretation of Section 7 ignores the parties' agreement, violates Section 203(d) and conflicts with its own decisions in *Western Electric* and *Collyer.*

While in the cases below, for reasons urged *supra,* the Board may not alter long-standing precedents and now require an employer to permit union representation during investigatory interviews, there exists an independent reason for this Court to repudiate these Board decisions. In *Quality* the Board has engaged in the meritricious practice of retroactively imposing its new rule so that an employer's conduct, lawful before the issuance of that decision pursuant to rules then in effect, was rendered illegal because of that decision. This practice must be discouraged by this Court if the administrative process is to enjoy the respect and esteem necessary for it to function properly.

Accordingly, and apart from all other matters relating to the legitimacy of the rule the Board would impose in these cases, this Court is urged to reject the Board's attempt to convert retroactively into unlawful conduct efforts to observe existing rules which were lawful when pursued.

27. 192 NLRB No. 150, 77 LRRM 1931 (1971).

CONCLUSION.

For the reasons stated herein, together with those raised by the employers, this Court is urged to declare that the rule of law adopted by the Board and challenged here is the product of an impermissible construction of the Act, and to affirm the decisions of the courts below.

Respectfully submitted,

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Supreme Court, U. S.
FILED
SEP 20 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-765

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, UPPER SOUTH DEPARTMENT, AFL-CIO, *Petitioner*

v.

QUALITY MANUFACTURING COMPANY AND NATIONAL LABOR RELATIONS BOARD

On Writ of Certiorari to the United States Court of Appeals For The Fourth Circuit

No. 73-1363

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

J. WEINGARTEN, INC.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF PETITIONER IN NO. 73-765 IN OPPOSITION TO MOTION OF CHAMBER OF COMMERCE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

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BRIEF OF PETITIONER IN NO. 73-765 IN OPPOSITION TO MOTION OF CHAMBER OF COMMERCE FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Petitioner in No. 73-765 opposes the motion of the Chamber of Commerce for leave to file a brief as *amicus curiae* in support of the position of Quality

Manufacturing Company in No. 73-765 and of J. Weingarten, Inc. in No. 73-1363. The petitions for writs of certiorari in each case were granted on the same day (April 29, 1974), present a common question, and were "set for oral argument in tandem."

The proffered *amicus* brief is altogether out of time. Rule 42(2) of this Court's Rules provides that an *amicus* brief shall be "presented within the time allowed for the filing of the brief of the party supported." Quality and Weingarten each filed their briefs on August 12, 1974. The *amicus* brief and the attached motion for leave to file it were not submitted until September 16, 1974, more than a month after the briefs of the parties to be supported had already been filed.

No reason justifying so untimely a filing is given. The petitions were granted on April 29, 1974, more than four and one-half months ago, and the briefs of the parties to be supported were filed August 12, 1974, more than a month ago. There was thus ample opportunity to present a timely brief.

While we fully appreciate the need to accommodate busy counsel, no reason is stated in the motion to extenuate the untimeliness of the brief. On the contrary, untimeliness has become a litigating habit with the Chamber of Commerce.[1] Respect for the obligation to achieve moderate compliance with the requirements of Rule 42(2) can only be inculcated by denying

[1] See pages 3-4 of the Memorandum In Opposition To Motion Of Chamber of Commerce For Leave To File Brief Amicus Curiae in *Florida Power & Light Co.* v. *I.B.E.W.*, and *N.L.R.B.* v. *I.B.E.W.*, Nos. 73-556 and 73-795. We are informed that the Chamber's motion to file an out-of-time *amicus* brief was denied in those cases.

habitual motions, unexplained and unjustified, for leave to file untimely *amicus* briefs.

For these reasons the motion for leave to file a brief as *amicus curiae* should be denied.

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